Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1150

CONCERNED CITIZENS
OF SOUTHERN OHIO, INC., ET AL.,
Appellants,

v.

THE PINE CREEK
CONSERVANCY DISTRICT, ET AL.,
Appellees.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO,
WESTERN DIVISION

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Opinion Below

The three judge court's memorandum delivered August 29, 1977, in the United States District Court for the Southern District of Ohio, Western Division styled below as case number C-1-75-5 is not officially reported to date. A copy is attached to this jurisdictional statement.

Grounds For Jurisdiction

Plaintiffs filed an action entitled *Concerned Citizens of Southern Ohio, Inc., et al. v. The Pine Creek Conservancy District, et al.* for declaratory relief, injunctive relief, and damages pursuant to the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. Sections 1983, 1985(3), and 1986 asserting the unconstitutionality of the Ohio Conservancy Act, Chapter 6101, Ohio Revised Code. A three judge district court was convened under authority of 28 U.S.C. Section 2281.

By order entered September 19, 1977, the United States District Court for the Southern District of Ohio overruled, rejected and dismissed the claims of the plaintiffs that various sections of Chapter 6101 of the Ohio Revised Code are unconstitutional. The notice of appeal was filed October 19, 1977, in the United States District Court for the Southern District of Ohio, Western Division.

This court has jurisdiction to consider this appeal under 28 U.S.C. Section 1253. *Florida Lime and Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 80 S.Ct. 568, 4 L. Ed. 2d 568 (1960); *Brotherhood of Locomotive Engineers v. Chicago, R.I. & P.R. Co.*, 382 U.S. 423, 86 S.Ct. 594, 15 L. Ed. 2d 501 (1966); *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L. Ed. 2d 223 (1975).

STATUTES INVOLVED

The validity of the following statutes of the State of Ohio are involved, the text of which are set out verbatim in Appendix A:

a. Section 6101.05, Page's Ohio Revised Code Annotated, Title 61, Supplement page 58.
b. Section 6101.07, Page's Ohio Revised Code Annotated, Title 61, Supplement page 59.
c. Section 6101.08, Page's Ohio Revised Code Annotated, Title 61, Supplement page 60.
d. Section 6101.13, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 61 and 62.
e. Section 6101.33, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 70 and 71.
f. Section 6101.34, Page's Ohio Revised Code Annotated, Title 61, Supplement page 71.
g. Section 6101.45, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 75 and 76.
h. Section 6101.48, Page's Ohio Revised Code Annotated, Title 61, Supplement pages 77 and 78.

The Ohio Conservancy Act, Chapter 6101, Ohio Revised Code, provides for the creation and management of conservancy districts. Under this Chapter, conservancy districts are given a variety of powers to deal with flood control, water supply, channel improvement, drainage, irrigation, sewage disposal, recreation and many other matters. Section 6101.05, Ohio Revised Code. The Act creates the "Conservancy Court" made up of one judge from each county included in whole or in part within the proposed District.

The authority of the Conservancy Court is absolute — combining all the traditional branches of government: judicial, executive and legislative.

The Conservancy Court performs a variety of judicial functions including a determination of whether a legally sufficient petition to create the District has been filed (Section 6101.07, Ohio Revised Code), holding hearings on exceptions to the appraisers' report and thereafter confirming benefits, damages and appraisals of property (Section 6101.33, Ohio Revised Code) which then is used as the basis for assessment of project costs and compensation for property later appropriated by the District (Section 6101.28, Ohio Revised Code). Furthermore, appeal by a property owner is to the local Common Pleas Court under Sections 163.01 to 163.32, Ohio Revised Code, an appeal back to the same Court from which the members of the conservancy court came (Section 6101.35, Ohio Revised Code).

In addition to performing judicial functions, the conservancy court also is the chief governing body of the conservancy district — the ultimate executive authority in the district. With no requirements for notice, hearing, or public participation, the conservancy court appoints the board of directors (Section 6101.10, Ohio Revised Code) and the board of appraisers (Section 6101.27, Ohio Revised Code); through these two bodies the district is governed. The conservancy court also is responsible for final approval of the Official Plan of projects with no standards for setting district policy (Section 6101.13, Ohio Revised Code), for setting rates for water provided by the district (Section 6101.24, Ohio Revised Code), for levying taxes to pay for recreational facilities (Section 6101.25, Ohio Revised Code), for holding an annual meeting to examine the annual report of the district (Section 6101.66, Ohio Revised Code), and for establishing compensation for

directors and appraisers (Section 6101.67, Ohio Revised Code). Just as shareholders of a private corporation, the conservancy court has ultimate control and responsibility for the actions of the corporate body of the district.

This discussion also indicates that the conservancy court, in determining whether to create a district or approve the plan, and in other ways, is making major policy decisions which amount to legislation for the conservancy district. Thus, a conservancy district is a general governmental body and the conservancy court is responsible for its most significant actions of a judicial, executive and legislative nature.

Questions Presented

1. Do the aforesaid sections of the Ohio Revised Code violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution because the conservancy court members sit in judgment of judicial cases in which they have an interest because they have executive responsibility for management and success of the district and receive specific additional remuneration for their service?

2. Do the aforesaid sections of the Ohio Revised Code violate the Equal Protection of the Laws clause of the Fourteenth Amendment to the United States Constitution because the governing body of a conservancy district consists of members elected from districts of unequal size?

3. Do the aforesaid sections of the Ohio Revised Code violate the Equal Protection of the Laws clause of the Fourteenth Amendment to the United States Constitution by permitting a municipality or other local governing body to sign a petition for creation of

a conservancy district, which action has the same effect as each freeholder of such political subdivision signing the petition, and thus discriminating between those persons living within and without such political subdivisions?

Statement Of The Case

Pine Creek, a tributary of the Ohio River, is located in the southern Ohio counties of Lawrence and Scioto. The watershed of Pine Creek is essentially rural with a population of some 17,000 people. In 1966 the Pine Creek Conservancy District was formed following the procedure outlined in Chapter 6101 of the Ohio Revised Code. It includes the portions of the watershed in Scioto and Lawrence counties, an area of approximately 117,800 acres. In April, 1968, the District adopted a plan which includes a number of dam and channelization projects. In January, 1972, the Conservancy District notified the landowners within the District of the appraisal of their property, and opposition to the District formed.

The present action was filed January 7, 1975, by opponents of the Pine Creek Conservancy District alleging the Ohio Conservancy Act is unconstitutional, fraud in the formation of the District, and violations of federal Civil Rights statutes. It was filed by residents and property owners for themselves and as a class action.

Plaintiffs filed for a preliminary injunction on February 14, 1975, and the matter was set for hearing. Based on representations of counsel for defendants that various actions plaintiffs requested be preliminarily enjoined would not be taken without fourteen days' notice to plaintiffs' counsel and the court,

plaintiffs agreed to and the District Court entered an indefinite continuance of the hearing on the preliminary injunction. The parties then conferred regarding the most expeditious means of resolving the dispute and submitted recommendations to the court. The court ordered that the parties brief the issues of the constitutionality of the Ohio Conservancy Act for submission to a three judge court and that other issues not requiring a three judge panel be considered thereafter. After briefing, the court filed a Memorandum Opinion on July 6, 1976, refusing to hold the Conservancy Act provisions attacked by Appellants unconstitutional, and a judgment order dismissing the constitutional claims for relief was filed August 23, 1976. This order was appealed to this Court which reversed the District court in a *per curiam* decision on February 22, 1976. *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, ... U.S. ..., 97 S.Ct. 828, 51 L. Ed. 2d 116 (1977). On remand the parties submitted additional briefs and the District Court in a second *per curiam* memorandum opinion rejected Appellants' claims of unconstitutionality. This decision was journalized in a judgment order dismissing the constitutional claims for relief filed September 19, 1977. Appellants filed notice of this appeal October 19, 1977.

SUBSTANTIAL QUESTIONS ARE PRESENTED

Appellants base their claim that the Ohio Conservancy Act violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution on the rationales set forth in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749, 50 ALR 1256 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972); *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L. Ed. 2d 633 (1961); and *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964).

I. THE PROVISIONS OF THE OHIO CONSERVANCY ACT, CHAPTER 6101 OF THE OHIO REVISED CODE, WHICH GIVE THE COURT ULTIMATE RESPONSIBILITY FOR THE FINANCIAL AND ADMINISTRATIVE SUCCESS OF THE DISTRICT WHILE STILL PLACING JUDICIAL AUTHORITY IN THE HANDS OF THE COURT AND WHICH AUTHORIZE SUPPLEMENTAL PAYMENT OF THE JUDGE OUT OF FUNDS OF THE CONSERVANCY DISTRICT WHEN FULFILLING DUTIES UNDER THE ACT VIOLATE THE PROHIBITION AGAINST DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW FOUND IN THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The controlling executive body of a conservancy district under the Ohio Conservancy Act is the Conservancy Court, which appoints the Board of Directors and the Board of Appraisers. The Conservancy Court also sits as a court to determine judicial disputes when exceptions are filed to decisions of the appraisers on valuation of land for appropriation or assessment purposes. Further compounding the problem, appeals from appraisal decisions of the conservancy court in appropriation cases must be made to the Court of Common Pleas, from which the members of the conservancy court are drawn.

This Court has established the principle that due process is violated when the outcome of the case will affect programs over which a court, in another capacity, has executive authority. *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L. Ed. 2d 267 (1972) or when a court has a financial interest in the outcome of a proceeding before it, *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L. Ed. 749, 50 ALR 1256 (1927).

The Court below, concentrating only on the question of formation of the district and ignoring the fact that the court also awards damages, sets compensation for the taking of land, and assesses the cost of projects, held that legislative and not adjudicatory functions are involved and thus, apparently, Appellants are not entitled to an unbiased tribunal. As even the dissent in this Court recognized, "[T]he majority of the functions of the Conservancy Court are admittedly judicial, ..." . . . U.S. . . . , 97 S.Ct. 832, 51 L. Ed. 2d 122. By considering only one function of the Conservancy Court, the District Court has again succeeded in ignoring the issue Appellants have attempted for more than three years to present for decision.

Under the Ohio statutes, both the possibility of bias because of the combination of executive and judicial functions, *Ward v. Village of Monroeville*, *supra*, and

the possibility of bias because the members of the Court receive compensation as a result of the specific outcomes of controversies they hear, *Tumey v. Ohio, supra,* are present.

As this Court stated in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L. Ed. 942 (1955), "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness." The interest of the conservancy court in the outcome of numerous adjudications coming before it creates a probability of bias, at least unconscious bias. Appellants have shown the executive and financial interest of the conservancy court in judicial cases before it at a level equivalent to that shown in *Ward v. Village of Monroeville, supra, Tumey v. Ohio, supra,* and *Gibson v. Berryhill,* 411 U.S. 564, 93 S.Ct. 1689, 36 L. Ed. 2d 488 (1973). To the extent that a court performs judicial functions, the Constitution requires that it be free of such biases.

II. SECTION 6101.07, OHIO REVISED CODE, PROVIDING FOR A CONSERVANCY COURT MADE UP OF ONE JUDGE FROM EACH COUNTY IN WHOLE OR PART WITHIN THE DISTRICT IS UNCONSTITUTIONAL AS IT DEPRIVES LANDOWNERS AND VOTERS WITHIN THE DISTRICT OF THE EQUAL PROTECTION OF THE LAWS.

Section 6101.07, Ohio Revised Code, provides that the conservancy court shall be made up of one judge from each county included in whole or in part within the district. The members of the conservancy court

are thus elected in an at large election in their respective counties. The conservancy court controls a governmental body in levying assessments and taxes, appropriating property, building lakes, rechanneling streams, providing water and sewage service, building and managing recreational facilities and numerous other governmental activities.

The system of using Common Pleas Court judges to govern the conservancy district results in unequal representation. As an example, the Pine Creek Conservancy District lies partially in Lawrence County and partially in Scioto County. In neither instance is the entire county included in the district. The population of Lawrence County in 1970 was 56,868 and the population of Scioto County was 76,951. (The Miami Conservancy District contains part of Montgomery, population 606,148, and neighboring Miami, population 84,342, counties.) U. S. Department of Commerce Bureau of Census, *Number of Inhabitants Ohio* Table 9, "Population and Land Area of Counties: 1970 and 1969." The judge from each county has equal voting power in making decisions for the conservancy court. No attempt is made to approximate the voting power of the judges to the number of people they represent, or to the land or people within the district which they represent. A voter in the Scioto County portion of the district has less say in choosing the conservancy court than does a voter in the Lawrence County portion of the district; his vote is debased. This results necessarily from the statutory scheme.

In governmental bodies, the Equal Protection clause requires equal representation. The requirement of "one man—one vote" was defined in *Reynolds v. Sims,* 377 U.S. 533, 84 S.Ct. 1362, 12 L. Ed. 2d 506 (1964), and

is applicable to local institutions of government. *Avery v. Midland County*, 390 U.S. 474, 88 S.Ct. 1114, 20 L. Ed. 2d 45 (1968), *Abate v. Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L. Ed. 2d 399 (1971).

However, Appellants' position does not depend upon a determination that the conservancy district is a general governmental body. While distinctions are permitted between citizens or groups of citizens which are *rationally* related to legitimate purposes of statutes, an invidious discrimination unrelated to such a purpose is prohibited by the Fourteenth Amendment.

> "It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution. But we also held many times that 'invidious' distinctions cannot be enacted without a violation of the Equal Protection Clause." *Williams v. Rhodes*, 393 U.S. 2330, 89 S.Ct. 5, 21 L. Ed. 2d 24 (1968).

The distinction made between the weight given votes of freeholders in Scioto and Lawrence Counties in the present case is unrelated to any rational purpose of the state in providing for the government of conservancy districts, and it is clearly invidious to those whose influence on decisions of the district is diluted because of the accident of where they reside.

Unlike the present case, *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 93 S.Ct. 1224, 35 L. Ed. 2d 659 (1973), involved a form of discrimination rationally related to the purpose of the state in setting up water districts. The issue presented there, as stated by Mr. Justice Rehnquist, was whether there was a denial of equal protection ". . . in that only landowners are permitted to vote in water storage district general elections, and votes in those elections are apportioned according to the assessed valuation of the land." 410 U.S. 719, 724. This is clearly a different form of discrimination from that presented in the present case. While the Court in *Salyer* found a rational relationship between the functions of the district relating to landowners only, it in no way sanctioned discrimination between landowners in different parts of the district involved. No justification exists for a person in Lawrence County to have greater influence in decision making of the district than persons in Scioto County. In simple fact, this case and *Salyer* present completely different issues: Here the discrimination is irrational and invidious while there it was rationally related to the purposes of the district. No statement of facts reasonably may be conceived to justify Ohio's decision to give greater weight to the votes of those on one side of a county line than those on the other side. *See* 410 U.S. 719, 732.

The basic principle of equal treatment of persons similarly situated found in the Fourteenth Amendment is violated by the Ohio Conservancy Act. There is no rational purpose in permitting freeholders in one county greater influence than those in another county. It is the simplest form of invidious discrimination, justified by no reason.

III. THE PROVISION OF SECTION 6101.05, OHIO REVISED CODE, PERMITTING A POLITICAL SUBDIVISION TO SIGN A PETITION FOR CREATION OF A CONSERVANCY DISTRICT ON BEHALF OF ALL ITS FREEHOLDERS VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF

THE UNITED STATES BY DISENFRANCHISING SOME BUT NOT ALL FREEHOLDERS WITHIN THE DISTRICT.

Section 6101.05, Ohio Revised Code, submits the first decision in the creation of a conservancy district to the freeholders, who must petition for its creation. This is the only step in the entire procedure which calls for any participation in support or opposition by the residents or landowners to the creation of the district or the execution of its projects. All later hearings provided by the statute are judicial and not legislative in nature—to prevail the opponent must deny and prove untrue the statements in the petition. Section 6101.08, Ohio Revised Code.

Section 6101.05, Ohio Revised Code, provides that the petition may be signed by the governing body of any public corporation in the proposed district. When such a public corporation signs the petition, all freeholders within it are conclusively presumed to favor creation of the district. In effect, all persons living in the three townships and one village which signed the petition who opposed the district were deprived of the right to oppose the district. Discrimination in public affairs between geographical areas is proscribed by the Equal Protection clause. *Moore v. Ogilvie*, 394 U.S. 814, 89 S.Ct. 1493, 23 L. Ed. 2d 1 (1969). There is no rational basis for such discrimination under the Ohio Conservancy Act.

CONCLUSION

It is submitted that the questions raised by this appeal are substantial, that the District Court below has erred, and that this Court should fully hear these three issues and prepare definitive opinions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon Duke W. Thomas, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, Attorneys for Appellees, by ordinary mail this .... day of February, 1978.

MICHAEL N. TOUSEY

§ 6101.05 Petition to establish conservancy district.

Proceedings for the establishment of a conservancy district shall be initiated only by the filing of a petition in the office of the clerk of the court of common pleas of one of the counties containing territory within the proposed district, which petition shall be signed either by five hundred freeholders, or by a majority of the freeholders, or by the owners of more than half of the property, in either acreage or value, within the limits

of the territory proposed to be organized into a district. Such petition may be signed by the governing body of any public corporation or watershed district created under section 6105.02 of the Revised Code lying wholly or partly within the proposed district, in such manner as it prescribes, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the freeholders of such public corporation or watershed district, as they appear upon the tax duplicate; and thereafter it is not necessary for individuals within said public corporation or watershed district to sign such a petition. Such a petition may also be signed by railroads and other corporations owning lands.

Such petition may be filed by any city interested in some degree in the improvement, upon proper action by its governing body.

The petition shall set forth the proposed name of said district, the necessity for the proposed work and that it will be conducive to the public health, safety, convenience, or welfare, and a general description of the purpose of the contemplated improvement, and of the territory to be included in the proposed district. Said description need not be given by metes and bounds or by legal subdivisions, but it is sufficient if a generally accurate description is given of the territory to be organized as a district. Said territory need not be contiguous, provided it is so situated that the public health, safety, convenience, or welfare will be promoted by the organization as a single district of the territory described. Except in the case of a subdistrict organized in pursuance of section 6101.71 of the Revised Code, said territory shall not be included wholly within the limits of a single municipal corporation.

Said petition shall pray for the organization of the district by the name proposed.

Upon the filing of such petition a judge of the court of common pleas of the county wherein the petition was filed shall determine whether it bears the necessary signatures and complies with the requirements of this section as to form and content. No petition with the requisite signatures shall be declared void because of alleged defects, but the judge, or the court in subsequent proceedings, may at any time permit the petition to be amended in form and substance to conform to the facts by correcting any errors in the description of the territory, or in any other particular. Several similar petitions or duplicate copies of the same petition for the organization of the same district may be filed and shall together be regarded as one petition. All such petitions filed prior to the determination of the sufficiency of said petition shall be considered as though they had been filed with the first petition placed on file.

In determining when a majority of landowners has signed the petition, the names as they appear upon the tax duplicate govern and are prima-facie evidence of such ownership.

§ 6101.07 Organization of court; powers and jurisdiction.

Upon the determination of a judge of the court of common pleas that a sufficient petition has been filed in such court in accordance with section 6101.05 of the Revised Code, he shall give notice thereof to the court of common pleas of each county included in whole or in part within the proposed conservancy district. The judge of the court of common pleas of each such county, or in the case of any county having more than one such judge, one judge assigned by order of the judges of the court of common pleas thereof, shall sit

as the court of common pleas of the county wherein the petition was filed to exercise the jurisdiction conferred by sections 6101.01 to 6101.84, inclusive, of the Revised Code. In case of the inability to serve of the judge of any county having only one judge, the chief justice of the supreme court, upon application of any interested person and proper showing of need, may assign a judge from another county to serve as a judge for such county during the disability of its local judge. The court of any county, presided over by the judges provided for in this section, may establish conservancy districts when the conditions stated in section 6101.05 of the Revised Code are found to exist. Except as otherwise provided by sections 6101.08 to 6101.84, inclusive, of the Revised Code, such court has, for all purposes of sections 6101.01 to 6101.84, inclusive, of the Revised Code, original and exclusive jurisdiction coextensive with the boundaries and limits of the district or proposed district and of the lands and other property included in, or proposed to be included in, such district or affected by such district, without regard to the usual limits of its jurisdiction. The judges of the court shall meet in the first instance upon the call of the judge determining the sufficiency of the petition and shall elect one of their number as presiding judge. Each judge when sitting as a member of the court shall receive such compensation and allowance for expenses as provided by law for a judge of the court of common pleas serving by assignment outside the county wherein he resides, which shall be paid as other expenses of the organization or operation of the district are paid.

The court shall adopt rules of practice and procedure not inconsistent with sections 6101.01 to 6101.84, inclusive, of the Revised Code, and the general laws of

this state. If the court consists of more than three judges, it may designate three of its members from three different counties to preside over the court, hear matters coming before the court, and make determinations and decisions or findings and recommendations, as the rules of the court provide, with respect to any matters authorized by such rules, the disposition of which is vested in the court, except that it shall not make final decisions and orders as to:

(A) The establishment, dissolution, or merger of the district or of subdistricts thereof;

(B) The adoption, rejection, or amendment of the official plan;

(C) The appointment and removal of directors and appraisers;

(D) The confirmation of the appraisers' report of benefits, damages, and appraisals of property;

(E) The authorization of maintenance assessments in excess of one per cent of benefits;

(F) The authorization of a readjustment of the appraisal of benefits in accordance with section 6101.54 of the Revised Code;

(G) The approval of the method of financing improvements and activities under section 6101.25 of the Revised Code;

(H) The determination of rates of compensation for water under sections 6101.24 and 6101.63 of the Revised Code;

(I) The examination of the annual report of the board of directors of the conservancy district as provided under section 6101.66 of the Revised Code.

The concurrence of two of the three judges so designated shall be necessary for an action or determination

thereby and it has, if so provided by the rules of the court, the same effect as though taken or made by the full court. All actions and determinations by the full court require the affirmative vote of a majority of the judges constituting the court. In all cases in which the judges are evenly divided that side with which the presiding judge votes shall prevail. In the event the court consists of two judges and they find themselves unable to agree on any question left to their decision, a judge of the court of common pleas of some other county shall be designated by the chief justice of the supreme court to sit and vote as a third member of the court until such question is decided.

When the court by its order entered of record decrees that a subdistrict be organized, the judge of the court of common pleas of each county included in whole or in part in the subdistrict, or in the case of any such county having more than one such judge, one judge assigned by order of the judges of the court of common pleas thereof, shall sit as the court of common pleas, with jurisdiction in all matters relating to the subdistrict, the disposition of which is vested in the court, except those listed in paragraph[s] (A), (C) and (I) of this section, which shall remain the responsibility of the full court.

§ 6101.08 Hearing on petition; order establishing conservancy district; appeal.

At the preliminary meeting of the court it shall fix the time and place of the hearing on the petition for the establishment of the proposed conservancy district, which hearing shall be held not later than sixty days thereafter, and the clerk of such court shall give notice of such hearing by publication. Any owner of real property in a proposed district who individually has

not signed such a petition and who wishes to object to the organization and incorporation of said district shall, on or before the date set for the cause to be heard, file his objections to the organization and incorporation of such district. Similarly, objections may be filed by any public corporation which has not signed such petition. Such objections shall be limited to a denial of the statements in the petition, and shall be heard by the court as an advanced case without unnecessary delay.

Upon the hearing, if it appears that the purposes of sections 6101.01 to 6101.84, inclusive, of the Revised Code, would be subserved by the creation of a district, the court, after disposing of all objections as justice and equity require, shall by its findings, duly entered of record: adjudicate all questions of jurisdiction; determine that the organization of the district for the purposes for which it is being organized, and that the surveys, plans, appraisals of benefits and damages, estimates of cost, land options, and the preparation of an official plan will benefit the area within the territorial boundaries of the district; declare the district organized; give it a corporate name by which in all proceedings it shall thereafter be known. A district so organized shall be a political subdivision of the state and a body corporate with all the powers of a corporation, and shall have perpetual existence, with power to sue and be sued, to incur debts, liabilities, and obligations, to exercise the right of eminent domain and of taxation and assessment as provided in such sections, to issue bonds, and to do all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested.

In such decree, the court shall designate the place where the office or principal place of business of the district shall be located, which shall be within the corporate limits of the district if practicable, and which may be changed by order of court. The regular meetings of the board of directors of the district shall be held at such office or place of business, but for cause may be adjourned to any other convenient place. The official records and files of the district shall be kept at such office except as otherwise approved by the court.

If the court finds that the property set out in said petition should not be incorporated into a district, it shall dismiss said proceeding, and adjudge the costs against the signers of the petition in the proportion of the interest represented by them.

After an order is entered, either dismissing the petition or establishing the district, such order is a final order and may be appealed by any interested party or by the state, within twenty days from the date that the order is entered. The organization of said district shall not be directly or collaterally questioned in any suit, action, or proceeding except as expressly authorized in sections 6101.01 to 6101.84, inclusive, of the Revised Code.

§ 6101.13 Official plan for district; hearing; approval by environmental protection agency.

Upon its qualification, or as soon thereafter as practicable, the board of directors of a conservancy district shall prepare a plan for such part or parts of the improvements for which the district was created as the board of directors shall deem advisable. Such plan shall be filed in accordance with this section, within two years from the date of the order establishing the district. The court may grant extensions of

time allowed for the filing of the plan if the board of directors so requests, for good cause shown. No plan or portion of a plan shall be prepared providing a water supply for domestic, industrial, or public use, or providing for the collection and disposal of sewage and other liquid wastes, for any municipal corporation, unless the governing body of such municipal corporation has petitioned the board to provide a water supply or a system for the collection and disposal of sewage and other liquid wastes, or has signed the petition initiating the proceeding by which the district acquired authority to undertake such improvements. Such plan shall include such maps, profiles, plans, and other data and descriptions as are necessary to set forth properly the location and character of the work and of the property benefited or taken or damaged, with estimates of cost for doing the work, including the proportion of the total cost to be assessed within the district, a breakdown of the sources of funds to be used in making the improvements, and the extent of participation, if any, by other political agencies in constructing the work.

If the board finds that any former survey made by any other district or in any other matter is useful for the purposes of the district, the board may take over the data secured by such survey, or such other proceedings as is useful to it, and may pay therefor an amount equal to the value of such data to said district. No construction shall be made under sections 6101.01 to 6101.84 of the Revised Code, which will cause the flooding of any municipal corporation or which will cause the water to back up into any municipal corporation, unless the board has acquired and paid for the right to use the land affected for such purpose, and has paid all damages incident thereto. No railroad shall be re-

quired to be constructed with a grade in excess of the maximum ruling grade then existing upon that division of said railroad whereon said change is required.

Upon the completion of such plan, the board shall file a copy thereof with the environmental protection agency which may approve or reject any provisions thereof relating to the supplying of water for domestic, industrial, and public use or to the collection and disposal of sewage and other liquid wastes. In deciding whether to approve or reject such provisions, the agency shall consider, among other factors, the protection of the public health, and compliance with air and water quality standards and regulations and solid waste disposal requirements. If the department rejects such provisions or refers them back for amendment, the board shall prepare other or amended provisions relating thereto. If the agency approves the provisions, it shall certify a copy of its action to the board, which shall file it as a record of the district.

Upon the completion of the plan and the approval by the agency, the board shall cause notice of the completion of such plan to be given by publication in accordance with section 6101.01 of the Revised Code, and shall file a copy of such plan in the office of the clerk of the common pleas court of each county in which works of improvement are proposed, or in which property would be benefited, damaged, or taken by the execution of such plan. Such copies shall be available for inspection by all persons, public corporations, and agencies of the state government interested. The board shall make copies of the plan available to any interested party, such copies to be supplied only at the cost thereof.

Said notice shall fix the times and places for the hearing of all objections to said plan which shall be

not less than twenty nor more than thirty days after the last publication of said notice. The board, or its duly appointed representative under this section, may, upon motion and for good cause shown, or upon its or his own motion, grant continuances to a day certain of the hearing on the plan. Such continuances shall not necessitate additional notice. All objections to said plan shall be in writing and filed with the secretary of the conservancy district at his office not more than twenty days after the last publication of said notice. A hearing on the objections so filed shall be provided for by the board in the county seat of each county in which a copy of the plan has been filed as required by this section, but such hearing may be canceled in any county from which no objections have emanated either from a resident or owner of property located therein. The board may, if it deems necessary, appoint one or more representatives each of whom shall be assigned by the board to conduct one or more of the hearings on the objections as required by this section and to cause a record to be made of each of such hearings and to report such record back to the board. After said hearings, the board shall adopt the plan with or without modifications as the official plan of the district. Within ten days after the adoption of the official plan by the board, the secretary of the conservancy district shall certify a copy thereof and deposit it with the clerk of the court who shall file it in the original case. If any person, public corporation, or agency of the state government objects to said official plan, so adopted, then such person, public corporation, or agency of the state government may, within thirty days from the adoption of said official plan, file their objections in writing, specifying the features of the plan to which they object, in the original case estab-

lishing the district in the office of the clerk of the court. The clerk of the court shall fix a day for a hearing upon said official plan before the court which shall not be less than twenty nor more than thirty days after the time fixed for filing objections, at which time the court shall hear any objections so filed and approved, reject, or refer back said plan to the board.

The court may, upon motion and for good cause shown, or upon its own motion, grant continuances to a date certain of the hearing on the plan when it is made to appear to the court that further time is needed for study of the plan by objectors. Such continuances shall not necessitate additional notice. If the court rejects said plan, the board shall proceed as in the first instance under this section to prepare another plan. If the court refers said plan to said board for amendment, then the court shall continue the hearing to a day certain without publication of notice. If the court approves said plan as the official plan of the district, a certified copy of the journal entry of the court shall be filed with the secretary, and by him incorporated into the records of the district. The board, with the approval of the court, may alter or add to the official plan until the appraisal record is filed, and of all such alterations and additions the board of appraisers of the conservancy district shall take notice; but if in the judgment of the court any such alteration or addition is material in character, the procedure thereon shall be the same as on the adoption of the plan. After the appraisal record has been filed in court, no alterations of the official plan or additions thereto shall be made except as provided in section 6101.39 of the Revised Code.

The board of directors of a conservancy district shall have full power and authority to devise, prepare for,

execute, maintain, and operate all works or improvements necessary or desirable to complete, maintain, operate, and protect the official plan. It may secure and use men and equipment under the supervision of the chief engineer or other agents, or it may let contracts for such works, either as a whole or in parts.

§ 6101.33 Hearing on appraisals; filing exceptions; special master commissioners.

Any property owner or public corporation may accept the appraisals in its favor of benefits and of damages and of lands to be taken made by the board of appraisers of a conservancy district, or may acquiesce in the board's failure to appraise damages in its favor, and shall be construed to have done so unless within thirty days after the last publication provided for in section 6101.32 of the Revised Code, or such additional time as may be granted by the presiding judge of the court, it files exceptions to said report or to any appraisal of either benefits or damages or of land to be taken which may be appropriated. All exceptions shall be heard by the court beginning not less than forty nor more than fifty days after the last publication provided for in such section, and determined in advance of other business so as to carry out, liberally, the purposes and needs of the district. The court shall provide for the hearing on the exceptions in the county seat of each county wherein property is located with respect to which an exception or exceptions have been filed at a time and place fixed by the court. Notice of the time and place of the hearing of his exception shall be given the exceptor in such manner as the court may direct. The hearing conducted in a particular county shall be limited to testimony presented by the district and by exceptors whose exceptions relate to property

located within said county. The court may, if it deems necessary, appoint one or more special master commissioners each to be assigned by the court to conduct one or more of the hearings on the exceptions as required by this section and to cause a record to be made of each of such hearings and to report such record, together with findings and recommendations, back to the court. Such special master commissioners shall have the usual powers possessed by special master commissioners as specified in section 2315.42 of the Revised Code, shall have the cooperation of the officials of the district in determining any facts relative to the appraisal report, and may use any abstracts, title certificates, title reports, or other information that the district has relative to any of the properties included on the appraisal report. The court may cancel the scheduled hearing in any county having few exceptors, providing such exceptors are given advance notice, in such manner as the court may direct, of the time and place of hearing in a nearby county at which they shall be heard upon their several objections. The court may, if it deems necessary, return the report to the board for its further consideration and amendment, and enter its order to that effect. If the appraisal record as a whole is referred back to the board, the court shall not resume the hearing thereof without new notice, as for an original hearing thereon. The court may, without losing jurisdiction over the appraisal record, order the board to recast the appraisal record when the order of the court specifies the precise character of the changes thereof.

§ 6101.34 Decree on appraisals.

If it appears to the satisfaction of the court after having heard and determined all the exceptions filed

pursuant to section 6101.33 of the Revised Code that the estimated cost of constructing the improvement contemplated in the official plan is less than the benefits appraised, then the court shall approve and confirm the report of the board of appraisers of a conservancy district as modified and amended, and, except as otherwise provided in sections 6101.43, 6101.54, 6101.60, and 6101.78 of the Revised Code, such findings and appraisals are final and incontestable. In considering the appraisals made by the board, the court shall take cognizance of the official plan and of the degree to which it is effective for the purposes of the district. If the court finds that the estimated benefits appraised are less than the total costs of the execution of the official plan, exclusive of interest on deferred payments, it shall disapprove the report of the board of appraisers and may return said official plan to the board of directors of the conservancy district with the order for it to prepare new or amended plans or it may disorganize the district after having provided for the payment of all expenditures.

§ 6101.45 Payment of preliminary expenses; preliminary assessment; state share of expenses.

After the filing of a petition for the organization of a conservancy district, and before the district is organized, the cost of publication and other official costs of the proceedings shall be paid out of the general funds of the county in which the petition is pending. Such payment shall be made on the warrant of the county auditor or on the order of the court. If the district is organized, such costs shall be repaid to the county out of the first funds received by the district through levying of assessments or selling of bonds, or the borrowing of money. If the district is not organized, the cost shall

be collected from the petitioners or their bondsmen. Upon the organization of the district, the court shall make an order indicating a preliminary division of the preliminary expenses between the counties included in the district in approximately the proportions of interest of the various counties as estimated by said court. The court shall issue an order to the auditor of each county to issue his warrant upon the county treasurer of his county to reimburse the county having paid the total cost.

As soon as any district has been organized, and a board of directors of the conservancy district has been appointed and qualified such board may levy upon the property within the district in each of not more than two years a preliminary assessment, based upon the benefit determined by the court as provided by section 6101.08 of the Revised Code, but not to exceed three tenths of a mill on the assessed valuation thereof to be used for the purpose of paying expenses of organization, for surveys and plans, appraisals, estimates of cost, land options, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This assessment shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. If such items of expense have already been paid in whole or in part from other sources, they may be repaid from the receipts of such levy, and such levy may be made although the work proposed may have been found impracticable or for other reasons is abandoned. The collection of such assessment shall conform in all matters to the sections of the Revised Code governing the collection of assessments levied by local political subdivisions, and the sections of the Revised

Code concerning the nonpayment of assessments levied by local political subdivisions shall apply. The board may borrow money in any manner provided for in sections 6101.01 to 6101.84, inclusive, of the Revised Code, and may pledge the receipts from such assessments for its repayment, the information collected by the necessary surveys, the appraisal of benefits and damages, and other information and data being of real value and constituting benefits for which said assessment may be levied. In case a district is disbanded for any cause before the work is constructed, the data, plans, and estimates which have been secure[d] shall be filed with the clerk of the court before which the district was organized and shall be matters of public record available to any person interested.

The board shall, upon levying the preliminary assessment, certify to the director of the department of natural resources an estimate of the amount of money the district will need to pay expenses of organization, for surveys and plans, appraisals, estimates of cost, land options and other incidental expenses up to the time money is received by the district from the sale of bonds or otherwise. The director, within sixty days after the receipt of such certification, shall upon finding that the organization and operation of the district contribute to the general welfare of the state, determine an equitable percentage of the amount so certified to be paid by the state. The director shall certify such determination to the board and shall cause to be paid to the district, out of any moneys appropriated to the department of natural resources for the purpose of assisting conservancy districts to pay expenses of organization, for surveys and plans, estimates of cost, land options and other incidental expenses, the amount de-

termined by him to be the equitable share of the state in meeting such expenses. The director shall make available to the board all plans, data, surveys or other information, which the department of natural resources or any division thereof may have, which will be beneficial to the board in furthering the purposes for which the district is organized.

§ 6101.48 Board of directors to levy assessment for bond fund.

After the appraisals record as approved by the court, or that part thereof from which no appeal is pending, has been filed with the secretary of the conservancy district as provided in section 6101.37 of the Revised Code, then from time to time, as the affairs of the district demand it, the board of directors of the conservancy district shall levy on all real property and on all public corporations, upon which benefits have been appraised, an assessment of such portion of said benefits as is found necessary by said board to pay the cost of the execution of the official plan including superintendence of construction and administration, plus one-ninth of said total to be added for contingencies, but not to exceed in the total of principal the appraised benefits so adjudicated.

Such assessment shall be apportioned to and levied on each tract of land or other property and each public corporation in said district in proportion to the benefits appraised, and not in excess thereof. Interest at a rate not to exceed ♦ **eight** per cent per annum, payable semi-annually shall be included in and added to the said assessment, but such interest shall not be considered as a part of the cost in determining whether or not the expenses and costs of making the improvement are equal to or in excess of the benefits appraised.

After the assessment is levied the board shall report it to the court for confirmation. Upon the entry of the order of the court confirming the assessment the clerk of the court shall transmit a certified copy of said order to the governing or taxing body of each political subdivision assessed and said governing or taxing body shall receive and file the same. Thereafter the board may order the issuance of notes in an amount not exceeding ninety per cent of the assessment in anticipation of the collection of the assessment.

After the court has confirmed the assessment the secretary of the conservancy district, at the expense of the district, shall prepare in duplicate an assessment record of the district. It shall be in a well-bound book indorsed and named "Conservancy Assessment Record of ..... District." It shall contain in tabular form a notation of the items of property appraised and the public corporations to which benefits have been appraised, the total amount of benefits appraised against each item or public corporation, and the total assessment levied against each item or public corporation. Where successive levies of assessment are made for the execution of the official plan and the acquisition or construction of improvements, the conservancy assessment record shall contain suitable notations to show the number of levies and the amount of each, to the end that the conservancy assessment record may disclose the aggregate of all such levies made up to that time.

Upon the completion of such record it shall be signed and certified by the president of the board and by the secretary of the conservancy district, attested by the seal of the district, and shall then be placed on file and become a permanent record in the office of said district. After the expiration of the thirty day period

for the payment of assessments as provided by section 6101.49 of the Revised Code, a copy of that part of the conservancy assessment record affecting lands or public corporations in any county shall be filed with the county auditor of such county.

If it is found at any time that the total amount of assessments levied is insufficient to pay the cost of works set out in the official plan or of additional work done, the board may make an additional levy to provide funds to complete the work, provided the total of all levies of such assessment exclusive of interest does not exceed the total of benefits appraised.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Western Division

Filed August 29, 1977

No. C-1-75-5

MEMO

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.,
Plaintiffs,

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.,
Defendants.

Before PECK, Circuit Judge, and PORTER and HOGAN, District Judges.

Per Curiam.

This case was filed in 1975. The plaintiffs sought a declaratory judgment declaring the Ohio Conservancy Act unconstitutional and enjoining the defendant Conservancy District from proceeding thereunder. A three-judge district court was convened and, on July 6, 1976, it concluded that the claims of the plaintiffs were foreclosed by *Orr v. Allen*, 248 U.S. 35 (1918) aff'g 245 Fed. 486 (W.D. Ohio 1917). Plaintiffs appealed to the United States Supreme Court. On February 22, 1977, the Supreme Court reversed and remanded for a full and independent consideration by this Court of three constitutional challenges made by the plaintiffs.

The three challenges leveled by the plaintiffs are as follows:

First — That it does violate due process for the conservancy courts to make the decision as to whether the conservancy districts which they will administer be formed.

Second — That the composition of the conservancy courts violates the one-man one-vote principle of *Baker v. Carr*, 369 U.S. 186 (1961) and *Reynolds v. Sims*, 377 U.S. 533 (1964).

Third — That the Act permits the disenfranchisement of freeholders affected by the decision to create a conservancy district because the statute creates a presumption that a local political body, such as a township, represents the views of all persons within its jurisdiction whenever it supports a petition proposing the creation of a conservancy district.

The parties stipulated that no evidentiary hearing was required and each side has submitted briefs. Oral argument was waived.

Ten Conservancy Districts organized and operating under the Act were granted leave to file a brief amicus and have done so.

The plaintiffs include a number of individual residents of, owners of property in, and taxpayers of the defendant District.

The defendant Pine Creek Conservancy District was organized in 1966 under Chapter 6101 of the Ohio Revised Code. This case was precipitated by an assessment process which was initiated in 1972.

The Conservancy Act was passed by the Ohio Legislature in its original form in 1914. In 1913 a series of disastrous floods occurred in a number of rivers within the State of Ohio. The purpose of the Act was to enable the establishment of various conservancy districts within the State as political subdivisions and public corporations invested with the power of carrying out flood prevention and control via, for example, regulating stream channels, arresting erosion, reclamation, irrigation, flow regulation, etc. Upon organization, the Districts have powers of condemnation, assessment, taxation, bond issue, contracting, construction, etc.

Initially a District could be organized only within one county. That, of course, was impractical and in the early days districts involving multi-counties were authorized.

The organization process commences with the filing of a petition in the office of the clerk of courts of one of the counties in which property to be affected is included. The petition must be signed by 500 freeholders or by a majority of the freeholders or by the owners of more than one-half of the property, in acreage or value, within the territory proposed to be organized.

The territory proposed to be organized must be generally described. The petition must outline the proposed improvement, allege the public need, and the necessity thereof and reasons therefor.

Upon the filing of the petition the Common Pleas Court in the county of filing determines whether the formal requirements have been met. Prior to that determination, the petitioners must file a bond "sufficient to pay all the expenses of the proceeding" in the event the Court should eventually decline to organize the District. Upon a determination of formal compliance,

the Common Pleas Court of each county containing territory involved is notified. There is thereupon established by the statute a "Conservancy Court" composed of one Common Pleas Court Judge from each county involved. Each judge has a single and even vote on matters which come before the Conservancy Court.

A judge, when sitting on the Conservancy Court, receives compensation therefor of $30.00 per day out of the District funds, in addition to his usual salary, and, if travel is involved, his necessary expenses (R.C. 6101.06 and 141.07).

The Court meets preliminarily for organizational purposes and fixes a time for hearing on the petition to establish. Notice by publication is required. Any property owner in the territory proposed may appear and object. (Some of the plaintiffs in this case were owners at the time of formation of Pine Creek. Some were not. No objections were made at that time by any plaintiff.)

At the hearing, if the Court determines that the formal requirements have been met and that the governmental purpose will be served thereby, the Court may declare the district organized. In this case (a) the governmental purpose of conservancy districts generally and Pine Creek in particular is conceded, (b) two of the plaintiffs' challenges go to the *formation* decision.

The purposes of the District are accomplished through two Boards appointed by the Court. One is a Board of Directors charged with formulating and executing and operating the project. The other is a board of appraisers which makes initial determinations of damage, benefits, lands to be condemned, valuations, "cost-benefit" determinations.

Under various sections of the Act the Court, in addition to the determination of whether to form or not and the appointment of the two Boards —

a) determines objections or exceptions to the appraisers' report respecting benefit, damage and appraisal;

b) determines whether the benefit of a project exceeds the cost;

c) reviews compensation awards for damages or taking of property (subject to the right of subsequent jury trial preserved to the owner);

d) reviews particular projects;

e) may set rates;

f) may levy taxes for certain recreational projects;

g) holds and conducts an annual meeting for examination of the annual report of the Board of Directors;

h) establishes the compensation to be paid to members of the Boards.

I.

The plaintiffs' first challenge is based on the principles involved in —

Tumey v. Ohio, 273 U.S. 510 (1927);
Ward v. Monroeville, 409 U.S. 57 (1972);
Gibson v. Berryhill, 411 U.S. 564 (1973).

The validity of the challenge depends on whether or not the decision to form is adjudicative and, if so, whether the pecuniary interest is "substantial." *Berryhill* at 579.

There is no dispute that the legislative or executive authority could have constitutionally formed conservancy and like districts without affording objectors a forum in which to object. The Ohio Legislature could

have constitutionally provided that a district could be formed by the simple collection and filing of petitions from individuals and bodies politic. There is no right to an adjudicative hearing at all in connection with the formation of such districts. *Hauck v. Little River District*, 239 U.S. 254 (1915). In *Tumey*, *Ward* and *Berryhill* the defendant had a right to the judicial or administrative hearing and therefore a right to an unbiased hearing officer. The questions involved in those cases were either clearly judicial or the administrative equivalent. The question of "formation vel non" in this case was not an adjudicative one but a legislative one. The hearing procedure relative to formation provided simply an additional check on the legislative process already petitioned for.

Furthermore, even were the cases relied on applicable to the proceeding involved, the pecuniary interest does not rise to the "substantiality" required. In the three cases relied on the hearing authority had before it an issue to decide and upon that decision the hearing authority, personally, or an entity in which the authority was interested was either actually or possibly benefited by a given determination — then and now. No *further* action or service on the part of the determining authority was called for. No question of compensation for future services was involved.

In this case the judges will be compensated for services rendered to and including the determination to form — whether the decision be to form or not form. As we have noted, the petitioners post a bond to accomplish just that. That factor was not involved in the cases relied on. Further, the pecuniary interest asserted as "conflicting" is "*compensation*" for future "services." Neither "compensation" nor "future services" was involved in the cases relied on. It is *not* claimed that the Ohio Statutory compensation is excessive. Conclusorily, and on balance, we hold simply that the pecuniary interest, under the circumstances of this case, is not substantial.

II.

The Conservancy Court of a District containing more than one county is composed of one judge per county. If a county having more than one judge is involved, the Common Pleas Court of that county selects one. If there are only two counties involved and the judges cannot agree, the Chief Justice of the State assigns a third judge from some county not involved. A majority of the judges is necessary for any decision if the membership is uneven. If even, a tie is broken by the vote of the Presiding Judge. Except in the latter instance, the vote of each judge bears the same weight. (R.C. 6101.07)

The Pine Tree District lies partly in Lawrence County and partly in Scioto County. They adjoin. In neither instance is the entire county within the District. The population of Lawrence County is substantially less than the population of Scioto County and has been at all times relevant to this controversy. The Common Pleas Court judges in Ohio are elected by popular vote in counties at large (the electors of each county elect the judge or judges of that county). Based on *Baker v. Carr*, 369 U.S. 186 (1961), *Reynolds v. Sims*, 377 U.S. 533 (1964) and similar subsequent cases, it is plaintiffs' claim that equal protection is denied to the voter of Scioto County in that he has less to say in choosing the membership of the Court than does the Lawrence County voter.

The majority of the functions of the Conservancy Court are judicial. The plaintiffs on brief point out that judicial powers exercised by the Court include determinations under R.C. 6101.07, 6101.33 and 6101.28 at a minimum. The "one-man one-vote" decisions do not apply to the selection of judges who "do not represent people — they serve people." *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973).

Nor does the Conservancy District — taking into consideration all of its powers, judicial and otherwise — exercise general governmental power. The citizens and electors of Scioto County as such have no interest in, nor are they as such affected by the action of the District. In order to successfully invoke the principles on which plaintiffs rely, it must be shown that the vote of an elector, whose interests as such are governmentally involved, was assigned more or less weight than other electors; or stated otherwise, equality of interest must receive equality in voter weight. There is simply no relationship of equality between voters or citizens of either or both counties in the District, because obviously many of the voters and residents of each county have no interest to be affected by the District. The facts do not warrant applying the principle the plaintiffs urge.

An Ohio Conservancy District, such as Pine Creek, is not a general governmental agency — it exists for the limited purpose of conservancy (and more particularly flood control). It compares to the water district involved in *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719 (1973). In that case the Court declined to extend the principle to such special or limited purpose agencies (at p. 430) —

> "We hold therefore that the popular election requirements enunciated by *Reynolds, supra*, and succeeding cases are inapplicable to elections such as the general election of appellee Water Storage District."

Finally, if the Ohio Legislature had reserved the right to appoint the members of the Conservancy Court and, upon formation, appointed one resident of each county to it, there would clearly be no *Reynolds v. Sims* problem. There is no constitutional right to "vote" on the membership of the Courts of such Districts, as it does not seem to this Court that the Ohio scheme has extended the franchise to the selection process by designating for membership someone who had been elected to another position. The members of the Conservancy Court are *not elected to that office*. They are essentially appointed by the legislature. We doubt it has ever been, even in passing, stated in Ohio that someone was "elected" to a conservancy district. Cf., *Sailors v. Board*, 387 U.S. 105 (1967) in which the Court, dealing with a local agency, pointed out "the delegates from the local school boards, not the school electors, select the members of the county school board. While the school electors elect the members of the local school boards and the local boards, in turn, select delegates. . . ." and held the system "is basically appointive rather than elective." It is our conclusion that the Ohio system involves essentially legislative selection rather than voter election — the facts are essentially more comparable to the facts in *Sailors* than in *Avery v. Midland Co.*, 390 U.S. 474 (1967).

III.

Under O.R.C. 6101.05 the establishment of a district is initiated by a petition signed either by

500 freeholders

or

a majority of the freeholders

or

the owners of one-half the property in acreage or amount

The statute then provides that —

> "[A] petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district . . . and when so signed by such governing body such a petition . . . shall fill all the requirements of representation upon such petition of the freeholders of such public corporation, as they appear on the tax duplicate; and thereafter it is not necessary for individuals within such public corporation to sign such petition."

At the most, the statute extends a presumption if a public corporation signs. For R.C. 6101.08 clearly provides that

> "any owner of real property in a proposed district who individually has not signed such a petition and who wishes to object to the organization and formation of the district shall . . . file his objections . . ."

A hearing is required and under the same section such an objector, as an "interested party," may appeal through the Ohio courts.

The petition which initiated the formation of Pine Creek was executed by three townships and one village (as well as individuals resident in other areas).

The plaintiffs assert this to be a denial of equal protection to those who resided in the three townships and one village and who opposed the formation of the District.

Plaintiffs designate the discrimination on brief as follows:

> "this has worked an unequal effect upon the plaintiffs owning land in these political subdivisions; persons owning land elsewhere in the District were free to support or oppose the district as they wished, but they were not."

This Court is at a loss to understand plaintiffs' argument — and plaintiffs cite no relevant authority to support it.

In the first place, the only thing the petition accomplishes is to secure a *consideration* of the question of formation. The purpose of the petition is and was merely to demonstrate substantial support as a requisite for consideration. Equating the votes of the township trustees to the votes of the freeholders in the township *for that purpose* is not discriminatory — it is merely alternative.

In the second place — wherein lies the discrimination, the property of any freeholder in Ohio is within the territory of *some* public corporation (city, village, or township). All freeholders are treated the same. If a given public corporation signs or does not sign, it carries the same result. Any freeholder living anywhere within the district is counted *if* his public corporation signs. That is constant. The statute does not discriminate. The different facts do.

In the third place, the assertion of the plaintiffs as a necessary part of their claim that "persons owning land in these (signatory) political subdivisions . . . were not . . . free to support or oppose the district" is simply not so. The statute clearly creates no presumption relative to the hearing as distinguished from the preliminary examination and no conclusive presumption at all. Any freeholder who has not in fact signed (whether in or out of the area of a signatory public corporation) may appear, except, object and appeal.

The Court concludes that O.R.C. Chapter 6101 is constitutional. A proposed judgment consistent herewith may be presented.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
Western Division

Filed Sept. 19, 1977

Case No. C-1-75-5

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.
Plaintiffs

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.
Defendants

JUDGMENT ORDER

This matter came on for hearing upon remand from the United States Supreme Court for a full and independent consideration by this three-judge district court of the constitutional challenges made by the plaintiffs. The parties stipulated that no evidentiary hearing was required, oral argument was waived, and each side has submitted briefs. Ten Conservancy Districts organized and operating under the Act were granted leave to file a brief amicus and have done so. This three-judge court has duly considered the matter.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, that the claims of the plaintiffs that various sections of Chapter 6101 of the Ohio Revised Code

are unconstitutional are OVERRULED, REJECTED AND DISMISSED.

/s/ JOHN W. PECK
United States Circuit Judge

/s/ DAVID S. PORTER
United States District Judge

/s/ TIMOTHY S. HOGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO
Eastern Division

Filed Oct. 19, 1977

Case No. C-1-75-5

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.,
Plaintiffs-Appellants

v.

THE PINE CREEK CONSERVANCY DISTRICT, et al.,
Defendants-Appellees

NOTICE OF APPEAL

Appellants, Concerned Citizens of Southern Ohio, Inc., C. G. Dalton, Asbury Arnett, Charles Bihl, John K. McHenry, Harvey Gillespie, Leonard Morris, and Leon A. Dalton, appeal to the Supreme Court of the United States from the judgment order of this Court entered September 19, 1977, overruling, rejecting, and dismissing the claims that various sections of Chapter 6101 of the Ohio Revised Code are unconstitutional.

This appeal is taken pursuant to 28 U.S.C.A., Section 1253. The Sixth, Fifth, and Third Claims for relief of Appellants' complaint, asserting that Chapter 6101 of the Ohio Revised Code is unconstitutional were

dismissed. The judgment order from which this appeal is taken is in favor of the validity of the statute.

Respectfully submitted,

/s/ MICHAEL N. TOUSEY
Trial Attorney

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Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was served upon Duke W. Thomas, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, Attorneys for all Defendants and Appellees, by ordinary mail this 17th day of October, 1977.

/s/ MICHAEL N. TOUSEY

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.
Appellants,

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.
Appellees.

On Direct Appeal From The United States District Court For The Southern District of Ohio Western Division

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., et al.

Appellants,

vs.

THE PINE CREEK CONSERVANCY DISTRICT, et al.

Appellees.

On Direct Appeal From The United States District Court For The Southern District of Ohio Western Division

MOTION TO AFFIRM

The appellees in the above captioned case move the Court to affirm the judgment of the three-judge court on the ground that it is manifest that the decision of the three-judge court is correct and the arguments of appellants are so unsubstantial as not to need further argument.

STATEMENT OF THE CASE

Appellees agree to the Statement of the Case as set forth in appellant's Jurisdictional Statement.

ARGUMENT

I. Chapter 6101 Of The Ohio Revised Code Complies With All Applicable Due Process Requirements Of The Fourteenth Amendment To The Constitution Of The United States

Section 6101.36 of the Ohio Revised Code allows all persons a jury trial before any property may be taken. The fact that such a trial would be held before a judge who is a member of the same Court of Common Pleas as the Conservancy Court Judge does not create a constitutional infirmity. (Appeals are taken to this Court under Sections 163.01 to 163.32, Ohio Revised Code, Appellants' Jurisdictional Statement, p. 4.) Appellants have made no showing that a judge would be biased because he must review the action of a fellow member of the bench.

Appellants have attempted to merge the Board of Directors and the Board of Appraisers into the Conservancy Court. They claim that since the Conservancy Court appoints the Board of Directors and the Board of Appraisers, the Conservancy Court cannot act fairly in reviewing actions of these boards. No specific illustration is set forth by appellants for this abstract argument nor is any authority cited to support this position.

Appellees submit that courts have historically appointed masters, hearing officers and referees to make findings and recommendations. Appellees have found no case holding that a court cannot constitutionally review the findings or recommendations of the persons appointed. This is especially true where, as in this case, the right of appeal is preserved for any proper party.

In examining the merits of this constitutional attack of appellants upon the impartiality of the Conservancy

Court, the District Court correctly rejected appellants' position. Under *Hauck vs. Little River District*, 239 U.S. 254 (1915), there was no constitutional right to an adjudicative hearing on the formation of the conservancy district. Thus, a hearing was merely an additional check on a legislative process. Additionally, the District Court found that there was no "substantial" pecuniary interest of the judges of the Conservancy Court in the outcome of a given determination. Judges are paid whether or not the district is formed. The possibility of future compensaton is neither conflicting nor substantial. Judges of the Conservancy Court will be paid from a general fund. This case is similar to *Dugan vs. Ohio*, 277 U.S. 61 (1928), which clearly distinguished *Tumey vs. Ohio*, 273 U.S. 510 (1927).

The reasoning of the District Court is clear, concise and correct. No substantial constitutional question is raised by appellants.

II. Section 6101.07, Ohio Revised Code, Does Not Deprive Either Landowners Or Voters Within A Conservancy District Of Equal Protection Of Of The Laws

The reasoning of the District Court in denying the "one-man one-vote" arguments of appellants is set forth at pages 41, 42 and 43 of the Jurisdictional Statement. Appellees will not burden the Court by restating the District Court reasoning in its entirety, but will simply try to summarize the reasoning.

In summary, the constitutional arguments of appellants were rejected for three reasons. First, the Conservancy Court functions are primarily judicial and "one-man one-vote" does not apply under *Wells vs. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), aff'd,

409 U.S. 1095 (1973). Second, an Ohio conservancy district exists for a limited purpose and "one-man one-vote" does not apply under *Salyer Land Co. vs. Tulare Water District*, 410 U.S. 719 (1973). Third, the members of a Conservancy Court are not elected, are essentially appointed by the legislature, and "one-man one-vote" does not apply under *Sailors vs. Board*, 387 U.S. 105 (1967).

Section 6101.07, Ohio Revised Code, does not deprive the appellants of any constitutional right and was correctly held to be constitutional by the District Court.

III. Section 6101.05, Ohio Revised Code, Does Not Deprive A Freeholder Of A Constitutional Right And Appellants' Claims Relating To This Section Are Barred By Laches

Appellants erroneously claim that under Section 6101.05, Ohio Revised Code, a freeholder residing in a public corporation is conclusively presumed to favor creation of the conservancy district if the public corporation supports the district. This completely ignores the provisions of Section 6101.08, Ohio Revised Code, which allow any freeholder to object to the formation of the district unless the freeholder has personally signed the petition for formation of the district.

As pointed out by the dissenting opinion in the previous appeal of this case, the claims of these appellants relating to formation of the Conservancy District should be barred by laches. *Concerned Citizens vs. Pine Creek Conservancy District*, 429 U.S. 651, (1977). Appellants have presented no excuse for the delay from 1966, when the district was formed, to 1975, when this suit was filed.

The District Court properly overruled appellants' constitutional argument involving Section 6101.05, Ohio Revised Code.

CONCLUSION

Appellants have raised no substantial questions or arguments necessitating further argument before this Court. Appellees, therefore, respectfully request this Court to grant their Motion to Affirm the decision of the three-judge court.

Respectfully submitted,

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52 East Gay Street
Columbus, Ohio 43215
Attorneys for Appellees,

The Pine Creek Conservancy District, et al.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Affirm has been sent to Michael N. Tousey, 169 East Livingston Avenue, Columbus, Ohio, 43215, attorney for appellants, this 4th day of May, 1978.

DUKE W. THOMAS

§6101.36. *Possession after verdict and deposit of award.* (GC §6828-35)

No property shall be taken under sections 6101.04 to 6101.84, inclusive, of the Revised Code, until compensation has been paid according to law. But where a trial is had by jury, and a verdict has been rendered which has been confirmed by the trial court, the board of directors of the conservancy district may pay the amount allowed into court in money with the costs, and thereupon such court shall make an order admitting the district into possession of the property and confirming its title thereto, although the owner may take steps to take the case to a higher court. Thereupon the board may enter into undisturbed possession of the property and rights involved.

Supreme Court, U. S.
FILED
MAY 4 1978
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., *et al.*,
Appellants,

v.

THE PINE CREEK CONSERVANCY DISTRICT, *et al.*,
Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

BRIEF OF AMICI CURIAE IN SUPPORT OF MOTION TO AFFIRM

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Supreme Court of the United States

October Term 1977

No. 77-1150

CONCERNED CITIZENS OF SOUTHERN OHIO, INC., *et al.*,
Appellants,

v.

THE PINE CREEK CONSERVANCY DISTRICT, *et al.*,
Appellees.

ON DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION

BRIEF OF AMICI CURIAE IN SUPPORT OF MOTION TO AFFIRM

IDENTIFICATION AND INTEREST OF AMICI CURIAE

Joining in this *amici curiae* brief are essentially all of the active conservancy districts in the State of Ohio, consisting of The Hocking Conservancy District, Lake Erie Conservancy District No. 1, The Margaret Creek Conservancy District, The Maumee Watershed Conservancy District, The Miami Conservancy District, The Mill

Creek Valley Conservancy District, Muskingum Watershed Conservancy District, Rushcreek Conservancy District, and The Wabash River Conservancy District of Ohio (hereinafter collectively referred to as the "Districts"). Pursuant to Rule 42(2), this brief is filed with the written consent of counsel for the appellants and counsel for the appellees, which consents have been filed with the Clerk of the Court.

The Districts joining in this brief are conservancy districts of the State of Ohio, organized and existing pursuant to the Ohio Conservancy Act, Chapter 6101, Ohio Revised Code. The Districts encompass within their boundaries all or a portion of forty-seven of the eighty-eight Ohio counties. As of December 31, 1976, the total bonded indebtedness of the Districts was $12,794,000.

This appeal presents a constitutional challenge to the Ohio statutes pursuant to which all Ohio conservancy districts have been organized and under which all such districts are operated and managed. The Court's decision on this appeal may affect the existence of all of Ohio's conservancy districts. On the basis of their collective experience, the Districts submit that the conservancy courts as they are presently constituted and function under the Ohio Conservancy Act are essential to the continued achievement of the beneficial purposes of the Act. They therefore respectfully submit this *amici curiae* brief in the interest of preserving the statutory provisions being challenged on this appeal.

COUNTER STATEMENT OF THE CASE

The Districts accept the procedural history of the case as set forth in the appellants' Jurisdictional Statement. Some further background as to the role of the conservancy court under the Ohio Conservancy Act and the facts in

the record as to the Pine Creek Conservancy District, however, may be helpful.

A. The Conservancy Court

Ohio Revised Code §6101.07 provides for the organization of conservancy courts to perform certain functions with regard to conservancy districts under the Conservancy Act. Such courts are made up of one judge of the court of common pleas from each county lying in whole or in part within a conservancy district. Ohio Revised Code §6101.07 (Appellants' Appendix, 17). The court comes into existence after a judge of the common pleas court in which the petition for the formation of a conservancy district is filed determines that the petition satisfies the signature and other requirements set forth in Ohio Revised Code §6101.05 (Appellants' Appendix, 15).

After the conservancy court is convened, it conducts a hearing to determine whether the petition for formation of the conservancy district should be granted. Ohio Revised Code §6101.08 (Appellants' Appendix, 20). If the petition is granted, the court appoints a board of directors for the district. Ohio Revised Code §6101.10. The board then prepares a plan of improvements for which the district was created, and after notice and a hearing, the board may adopt such plan. Ohio Revised Code §6101.13 (Appellants' Appendix, 22). If the plan is adopted, the board submits the plan to the court. After notice and another hearing, the court may approve the plan. Ohio Revised Code §6101.13.

If the conservancy court finds the petition sufficient, it appoints a board of appraisers for the district. Ohio Revised Code §6101.27 (Appendix E attached hereto, A17). The board must appraise the benefits of every kind which will result from the improvements included in the plan and appraise the damages sustained and the value of land

and other property necessary to be taken for the improvements. Ohio Revised Code §6101.28 (Appendix E, A18). After the appraisals are completed, they are prepared as a report and filed with the clerk of the conservancy court. Ohio Revised Code §6101.31 (Appendix E, A20). After notice and an opportunity to be heard (Ohio Revised Code §6101.32, Appendix E, A21 and §6101.33, Appellants' Appendix, 27), the court may return the report to the board for further consideration, or order the board to alter the report in specific respects. Ohio Revised Code §6101.33. If satisfied with the report and that the estimated cost of constructing the improvements is less than the benefits appraised, the court approves the report. Ohio Revised Code §6101.34 (Appellants' Appendix, 28).

If the owner of property scheduled to be taken or damaged for the purposes of the improvement is not satisfied with the award as to compensation or damages as set forth in the report as confirmed by the court, such owner has the right to a trial *de novo* under the procedures of Ohio's Uniform Eminent Domain Act. Ohio Revised Code §6101.35 (Appendix E, A24) and Chapter 163, Ohio Revised Code (Appendix B, A3).

The conservancy court manages none of the district's facilities or services, initiates no revenue-generating measures for the district, and does not participate in deciding how the district's money is spent, excepting only that it determines the compensation of the members of the district's boards, the maximum amount of which is set by statute. Ohio Revised Code §6101.67.

B. The Pine Creek Conservancy District

The Pine Creek Conservancy District was formed in 1966 in apparent conformity with the procedures set out in the Conservancy Act. It is located in southern Ohio and has within its boundaries a portion of Scioto County and a portion of Lawrence County.

The record before this Court presents no evidence as to how many persons from Scioto County or from Lawrence County reside within the district. There is nothing in the record to show the value or the extent of the land owned by the appellants situated within the district. The record is devoid of facts to indicate that appellants, or any of them, have property which is scheduled to be taken or damaged in the prosecution of the plan for the district. The appellants have failed to develop a record which is adequate to present any constitutional issue for plenary consideration of this appeal.

ARGUMENT

I. THE OHIO CONSERVANCY ACT, IN PROVIDING FOR A CONSERVANCY COURT IN THE FORMATION AND ADMINISTRATION OF A CONSERVANCY DISTRICT, DOES NOT OFFEND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants' first challenge to the constitutionality of the Ohio Conservancy Act, Chapter 6101 of the Ohio Revised Code, seeks to invoke the principle in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Monroeville*, 409 U.S. 57 (1972). Under scrutiny in those cases were state procedures by which the chief executive officer of a municipality in a criminal case could try, convict and fine a defendant where such chief executive officer had a substantial pecuniary interest in the conviction. Such procedures were found to be incompatible with due process.

Appellants' first constitutional challenge to the Ohio Conservancy Act *assumes* that the kind of adjudicative process involved in *Tumey*, *Ward*, *In re Murchison*, 349 U.S. 133 (1955) and *Gibson v. Berryhill*, 411 U.S. 564 (1973) is the same kind of process which the conservancy court is called upon to perform under Chapter 6101 of the Ohio Revised Code. In this assumption, appellants err.

Decisions by this Court involving drainage, irrigation and other "special benefit" districts have long recognized the special nature of the kinds of decisions initially made in the organization and operation of such districts. Specifically, this Court has repeatedly held that in the context of levying special assessments to pay for the improvements of such districts, and in awarding compensation for property taken or damaged to achieve the purpose of such districts, state legislatures consistent with due process may delegate all such decisions *in the first instance* to a single board, body or tribunal *so long as*, at some point in the proceedings before such decisions become final, an adversely affected party is provided with notice and the opportunity to be heard in a trial *de novo* in the state's regular court system.

In *Hagar v. Reclamation District No. 108*, 111 U.S. 701 (1884), a California statute established a procedure by which reclamation districts could be formed, a procedure which bears a striking resemblance to the Ohio Conservancy Act. Under the California statute, a reclamation district embracing over 74,000 acres situated in two counties was established, a reclamation works was planned and a first assessment to pay the estimated cost of the works was levied upon the lands in the district. When the monies under the first assessment proved insufficient to complete the project, an additional sum was assessed and levied. The second assessment became delinquent on the defendant's lands, and the district brought this action to sell the lands to satisfy the assessments. The trial court upheld the liens and ordered the lands sold. On appeal, the Supreme Court affirmed. In this opinion, the Court observed:

> "The system adopted in California to reclaim swamp and overflowed lands by forming districts . . . is not essentially different from that of other States, where lands of that description are found. The fact that the lands may be situated in more than one county, cannot affect the power of the State to delegate authority for the establishment of a reclamation district to the supervisors of the county containing the greater part of the lands. Such authority may be lodged in any board or tribunal which the legislature may designate." 111 U.S. at 704-705.

This Court went on to hold that if the legislature delegates to a tribunal the task of levying a tax on property according to its value, if the landowners were not given notice and an opportunity to be heard *prior* to the levy of assessment, due process is nevertheless afforded if the assessment can only be enforced through legal proceedings wherein notice and the opportunity to be heard are provided.

> "The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defence going either to its validity or amount could be pleaded. In ordinary taxation assessments, if not altered by a board of revision or of equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defence, all his grievances. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the New Orleans case, these words as used in the Constitution, can have no definite meaning." 111 U.S. at 711-712. (Citation omitted.)

As was made clear in *Spencer v. Merchant*, 125 U.S. 345 (1888), some of the decisions involved in the carrying

out of a district's purposes are not subject to judicial review at all:

> "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading or repairing of a street, to be assessed upon the owners of lands benefited thereby; and the determination of the territorial district which should be taxed for a local improvement is within the province of legislative discretion. If the legislature provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." 125 U.S. at 355-356. (Citations omitted.)

In *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896), this Court upheld an 1887 statute for the organization and government of irrigation districts in California. Under the statute, landowners could petition the supervisors of the county in which was located the greatest portion of the lands proposed to be included in the district. The petition was to set forth the boundaries of the district and ask that the district be established. The statute provided for published notice in each county in which any portion of the proposed district would lie, stating the time of the meeting at which the petition would be presented to the supervisors. The statute further stated that when the petition was presented the board "shall hear the same . . . ." This procedure is fundamentally identical to the organizational steps provided for in the Ohio Conservancy Act. This procedure was followed in *Fallbrook*, and the organizational expense of the district was assessed on lands within the district. Plaintiffs brought this action to set aside the assessment, alleging that plaintiffs' lands did not need water and that the plaintiffs had not been given a hearing

as to the benefits assessed. The Circuit Court for the Southern District of California held the assessment unconstitutional. The Supreme Court reversed. In the opinion, the Court made clear that where the legislative scheme provided for a hearing *at some time* to those interested in the question whether lands included in the district would be benefited by the proposed project, such procedure satisfied the requirements of the due process clause.

> "It is one of those matters of detail in arriving at the proper and fair amount and proportion of the tax that is to be levied on the land with regard to the benefits it has received, *which is open to the discretion of the state legislature, and with which this court ought to have nothing to do.* The way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law." 164 U.S. at 176-177. (Emphasis supplied.)

In *Bauman v. Ross*, 167 U.S. 548 (1897), the constitutionality of an Act of Congress providing for road improvements in the District of Columbia was upheld. There, the same "tribunal" or "commission" appointed by a court (and referred to as "a jury" in the statute) participated in the exercise of both the taxing power and the power of eminent domain in that the same tribunal awarded compensation for the taking of property for the street improvements and assessed "benefits" on other property (by which revenue is obtained) in order to pay for such taking. Mr. Justice Gray expressed the unanimous opinion of the Court, as follows:

> "Likewise, in the matter of assessing benefits, under the right of taxation, *it is within the discretion of the legislature*, as shown by the authorities already referred to upon this subject, *to commit the ascertainment of the lands to be assessed, as well as the appor-*

tionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe.

"Whether the estimate of damages and the assessment of benefits shall be entrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. *And there are many precedents for entrusting the performance of both duties to the same persons.*" 167 U.S. 593. (Citations omitted; emphasis supplied.)

Hibben v. Smith, 191 U.S. 310 (1903) was an action to foreclose a lien of assessment on defendant's property levied to help pay for a street improvement. The defendant resisted on the ground, among others, that all members of the board of the town which confirmed the assessments were residents and taxpayers of the town, and therefore "judges in their own case." The courts below upheld the validity of the assessment. In rejecting the defendant's constitutional challenges and affirming the judgment below, the Court said:

"We think the first objection, that all of the members of the board of trustees were residents of and taxpayers in the town, is wholly unimportant. * * * It is a matter of legislative discretion as to how such a board shall be constituted, and we hazard nothing in saying that it is quite common throughout the country for the legislatures of the States to create a tribunal for levying assessments for local improvements in a manner precisely like the case in question. *It is not at all analogous, even in principle, to a judge of a court acting in a case in which he is personally interested.*" 191 U.S. at 323. (Emphasis supplied.)

In *Londoner v. Denver*, 210 U.S. 373 (1908), an assessment for a local improvement was invalidated after it was proven, on the facts in the record, that the plaintiff

landowners had been given no opportunity for a hearing on the question of benefits prior to the assessment becoming irrevocably fixed. 210 U.S. at 386. Under Colorado law, no right was afforded for any judicial review (by appeal or by independent suit) of the validity of the special assessment. 210 U.S. at 380-386. In the course of the opinion, however, the Court rejected the constitutional assault on the Colorado statute establishing the framework for such improvements and assessments. After noting that the statute provided for a hearing before a board of equalization on landowners' objections to the validity and amount of the assessment prior to the levy of such assessment, the Court declared that the statute itself was "clear of all constitutional faults." 210 U.S. at 380.

The Drainage District Act of Missouri was under review in *Houck v. Little River Drainage District*, 239 U.S. 254 (1915). As provided in the Act, the defendant district had been established pursuant to the judgment of the Missouri circuit court. This suit was brought by owners of land within the boundaries of the district to restrain collection of an assessment to pay for the preliminary expense of organizing the district. The plaintiffs claimed that the statute, and the tax levied pursuant to the statute, worked to deprive them of their property without due process of law. This Court rejected that contention:

"The legislature, unless restricted by the state constitution, can create (improvement and assessment) districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. *The propriety of a delegation of this sort was a question for the State alone.* And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define

the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. 239 U.S. at 262. (Citation omitted; emphasis supplied.)

In *Embree v. Kansas City Road District*, 240 U.S. 242 (1916), the Missouri statutes provided for the establishment of a road district by order of a county court. Consistent with the procedures found in the Ohio Conservancy Act, under the Missouri statutes the need for the district and its territory and boundaries were questions committed to the judgment of the county court subject to certain statutory requirements, including the requirement of public notice of the date the landowners' petition would be "considered" by the court, at which time any interested landowner would be afforded an opportunity to be heard. This action was brought by owners of land in the district to restrain the sale of bonds and the levy of special taxes to pay them. The Missouri courts rejected the plaintiffs' attack on the constitutionality of the Missouri Road District Act. This Court affirmed.

The statute itself passed constitutional muster in providing for notice to the public of the filing of the petition and that it would be considered by the county court at a given date. 240 U.S. at 248-249. Responding to the appellants' charge that an adequate hearing could not be provided because the road to be improved had not yet been selected, the Court stated that it was "not impressed with this contention." 240 U.S. at 249.

> "At best the question is one of opinion and degree, even where the improvement to be made has been definitely determined. The boundaries of drainage, irrigation and other benefit districts are often defined in this way. Indeed, it is conceded that had the legislature created this particular district the present objection would be untenable. If such a body can obtain the requisite information and exercise the requisite judgment, it is

> not easy to believe that the task would be more difficult for a county court sitting in the vicinity." 240 U.S. at 250.

In asserting that under Chapter 6101 of the Ohio Revised Code, the conservancy court is called upon to "determine judicial disputes," the appellants fail to point out how such determinations could in theory, or in fact, adversely affect them. Nor could they. For under Chapter 6101, there is no determination (of the kind which is subject to judicial review) which becomes irrevocable and uncontestable as to directly affected landowners at any stage in the conservancy court proceedings.

As to the amount and validity of the assessment, under Ohio's statutes, landowners have the right to file an independent suit to enjoin the illegal levy or collection of taxes and assessments. See §2723.01, Ohio Revised Code Appendix D, A14). Moreover, as was the case in *Hagar, supra,* and *Embree, supra,* in order to enforce a lien of assessment approved by the conservancy court, an individual suit must be filed by the district, in which the landowner may raise all such questions. See §6101.60, Ohio Revised Code (Appendix E, A29). Furthermore, §6101.43, Ohio Revised Code Appendix E, A25) establishes procedures to be followed in the event that the appraisal of benefits

> ". . . is declared by any court of competent jurisdiction to be invalid . . . ."

The General Assembly of Ohio would not have created such procedures if it intended that conservancy court confirmation of the appraisal report placed the appraisal of benefits beyond the reach of further judicial review.

With respect to the exercise of the power of eminent domain, again the procedures of Chapter 6101 provide abundant protection to all whose land may be damaged

or taken for the project. Under the Conservancy Act, any person not pleased with the amount of the conservancy court award as to compensation or damages may require the district to commence an independent action pursuant to the procedures of the Ohio Uniform Eminent Domain Act (Appendix B, A3). This is done simply by filing "a written notice" and a nominal bond with the clerk of the conservancy court. Ohio Revised Code §6101.35 (Appendix E, A24). Once the notice is filed, the conservancy district must resort to the procedures of the Eminent Domain Act, wherein the question of the amount to be awarded to the defendant property owner must be determined by a jury (and not the court). The requirements of due process are fully satisfied if, regardless of a possible preliminary defect in a condemnation procedure, the property owner, prior to the taking of his property, is afforded a trial *de novo* in which due process requirements are met. *Bailey v. Anderson*, 326 U.S. 203 (1945); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925); *Bragg v. Weaver*, 251 U.S. 57 (1919).

Without having established, on this record, that any appellant is threatened with the taking or damaging of property by reason of the improvements planned for the Pine Creek Conservancy District, appellants nevertheless suggest a theoretical possibility that a judge of the conservancy court may be the same judge before whom the appropriation action may be filed under the Ohio Eminent Domain Act.[1]

But even this possibility is remote. Under Chapter 163 of the Ohio Revised Code, the independent appropriation action may be filed either in the Court of Common

[1] This Court has repeatedly refused to declare a statute unconstitutional on its face based on a hypothetical case. *United States v. Raines*, 362 U.S. 17, 21-22 (1960); *Lindsey v. Normet*, 405 U.S. 56, 65 (1972); and *Whalen v. Roe*, 429 U.S. 589, 600, 605-606 (1977).

Pleas or in the Probate Division. §163.01(B), §163.05, Ohio Revised Code (Appendix B, A3, A4). If the proceeding is commenced in the Probate Division, it cannot be before any judge who might serve on the conservancy court since the judge of the Probate Division is specifically elected thereto. Ohio Constitution, Art. IV, §4(C) (Appendix A, A2). Also see Ohio Revised Code §2101.01 (Appendix C, A13). If the proceeding were filed in the Court of Common Pleas, there is no assurance that the judge who was appointed to the conservancy court would be the judge presiding over the eminent domain action. The Pine Creek Conservancy District is located in parts of Lawrence and Scioto Counties. In both such counties there are two Common Pleas judges (Appendix F, A30, A31). Even if the case were initially filed in the Court of Common Pleas and assigned to a judge who also serves on the conservancy court, there should be no presumption that upon objection duly raised, such judge would fail to disqualify himself or to be disqualified pursuant to the procedures of §2701.03 of the Ohio Revised Code.

In summary, then, the above discussion has endeavored to show that the kinds of tasks delegated by the Ohio Legislature to the conservancy court are fundamentally different from the adjudicative process implicated in *Tumey, supra*, and *Ward, supra*, and that therefore the *Tumey* principle is inapposite here. Moreover, as pointed out above, there is no determination made by the conservancy court which impinges upon any of appellants' rights sufficiently to raise a due process issue because both on questions of assessment (the validity and the amount) and taking, there is full opportunity to have all appropriate issues determined *de novo* in the Ohio courts.

But even if the processes involved in the operation of the conservancy court were construed to be final and strictly judicial in nature, *Tumey, supra*, and its progeny would have no application here.

The appellants argue that the judges of the conservancy court are paid a statutory per diem for their services out of the funds of the district. Ohio Revised Code §6101.08. Accordingly, appellants say that the judges have a pecuniary interest in ruling favorably on the petition so that a district may be created to compensate them for their services in reviewing the petition, and, once the district is established, they have an interest in denying exceptions to the appraisers' reports to insure that the district will have funds to pay their per diems. This argument, however, is refuted by the terms of the Conservancy Act.

With regard to proceedings on the petition, the judges are paid whether or not a district is established. The Act requires those filing a petition for a district to file a bond to secure the costs of the proceedings on the petition (Ohio Revised Code §6101.06, Appendix E, A16), and authorizes the costs of such proceedings to be paid out of that bond if the petition is denied (Ohio Revised Code §6101.08, Appellants' Appendix, 20). The conservancy court, therefore, has no *Tumey* interest in the outcome of the proceedings on the petition.

Nor is there any pecuniary incentive to rule one way or the other on exceptions to the appraisers' reports after the district is formed. The per diems are paid out of the funds of the district regardless of whether the exceptions are granted or denied. See *Dugan v. Ohio*, 277 U.S. 61, 65 (1928).

Moreover, another fundamental distinction exists between the *Tumey* situation and the proceedings of a conservancy court. In the latter situation, the special benefits found form the basis for special assessments levied to pay all or part of the cost of the public improvement. Such amount is finite in its total. If the benefits assessed to one landowner are changed (lowered or raised) as a result of the board conservancy court proceedings, the total of the

assessments required to meet the cost of the improvement would nevertheless remain the same. Only the apportionment between the property owners would vary. Therefore, there is no proscribed *Tumey* incentive built into the conservancy court proceedings which might tend to cause the court to wish to reject a particular landowner's exceptions.

Finally, an examination of the functions of the conservancy court demonstrates that the court has no responsibility for initiating revenue-generating measures and has only an insubstantial role in determining how the funds of the district are spent. Its function with regard to the finances of the district is primarily to review what the board of directors has done or proposes to do in certain specifically enumerated areas, thereby providing a check upon the exercise of the board's discretion.

For all of the above reasons, appellants' first constitutional challenge to the Ohio Conservancy Act is wholly insubstantial.

II. SECTION 6101.07 OF THE OHIO REVISED CODE, IN PROVIDING FOR A CONSERVANCY COURT MADE UP OF ONE JUDGE FROM EACH COUNTY WITHIN THE DISTRICT, DOES NOT DEPRIVE THE VOTER OF THE DISTRICT EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants assert that Ohio Revised Code §6101.07 is unconstitutional because the voters of the counties within the conservancy district are disproportionately represented on the conservancy court. This claim was properly denied by the court below because the "one-man, one-vote" principle clearly does not apply to bodies such as the conservancy court.

As the discussion in Part I above has attempted to show, the conservancy court is a tribunal selected by the

state legislature to carry out conservancy projects serving the public interest. Such tribunal is provided guidelines by the state legislature, and administers the policies established in the Act. It is not a body concerning which the vote of the people is required. *Sailors v. Board of Education*, 387 U.S. 105 (1967). There is, therefore, no occasion for application of the rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), *Avery v. Midland County*, 390 U.S. 474 (1968) and *Abate v. Mundt*, 403 U.S. 182 (1971).

Moreover, in *Avery v. Midland, supra*, this Court held that "one-man, one-vote" applies to governmental bodies below the state level only if such bodies exercise ". . . general governmental powers . . . ." *Id.* at 485. Inspection of the various provisions of the Conservancy Act demonstrates that the conservancy court does not exercise general governmental powers. In such a case, this Court has held the "one-man, one-vote" principle inappropriate. *Salyer Land Co. v. Tulare Water District*, 410 U.S. 719, 729-731 (1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement District*, 410 U.S. 743 (1973).

The powers exercised by the conservancy court are much less sweeping than those exercised by the bodies in *Salyer Land Co.* and *Associated Enterprises, Inc., supra.* After the conservancy court rules on the petition for creation of the district (Ohio Revised Code §6101.08) and the district's official plan (Ohio Revised Code §6101.13), and appoints the boards of directors and appraisers (Ohio Revised Code §§6101.10, 6101.27), its functions are limited to reviewing and approving or disapproving certain specifically designated activities that the district's boards have undertaken or propose to undertake (Ohio Revised Code §§6101.33, 6101.39, 6101.44, 6101.45, 6101.53, 6101.54, 6101.63).

Finally, the appellants have failed to prove that their equal protection claim has any factual basis. The

Pine Creek Conservancy District is made up of a portion, but not all, of Scioto County and a portion, but not all, of Lawrence County. In 1970 Scioto County had approximately 20,000 more residents than Lawrence County. Yet appellants placed no evidence in the record showing how many residents of each of the respective counties resided within the district, *despite* the admonishment in the dissenting opinion in the first appeal in this case that the record was defective in this regard. *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, 429 U.S. 651, 659 n. 6 (1977) (Rehnquist, J. dissenting). Therefore, assuming *arguendo* that the number and residency of electors were relevant in the context of a special purpose district established by the legislature to construct improvements to be paid for by special assessments levied on real property to the extent of the special benefits conferred on such property, in this case there has been no showing that the weight of the votes of those citizens of Scioto County residing within the district is in a substantial way diluted when compared with the votes of those citizens of Lawrence County who live within the district. *Reynolds v. Sims*, 377 U.S. at 568. Where, as here, a state statute is being challenged on the ground of equal protection, the party bringing the challenge has the burden of proving the alleged discrimination. *Corporation Comm'n v. Lowe*, 281 U.S. 431, 438 (1930). This is true in the "one-man, one-vote" context. *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971). By failing to prove any disparity in the population of those portions of the two counties within the district, appellants have failed to meet that burden.[2]

[2] This failure of proof is especially critical in light of this Court's pronouncement that, except in the case of Congressional districts, minor population deviations among districts that elect members of a governmental body do not create an equal protection problem. *Gaffney v. Cummings*, 412 U.S. 735, 741-745 (1973).

III. THE PROVISION OF SECTION 6101.05, OHIO REVISED CODE, PERMITTING A POLITICAL SUBDIVISION TO SIGN A PETITION FOR CREATION OF A CONSERVANCY DISTRICT DOES NOT DISENFRANCHISE ANYONE.

Appellants argue that the challenged provisions of Ohio Revised Code §6101.05 unconstitutionally disenfranchise certain freeholders from the process by which it is decided whether or not a conservancy district is to be created. This disenfranchisement occurs, the appellants contend, because the statute permits the governing body of a public corporation or watershed district lying wholly or partly within the proposed district to sign the organization petition, and such a signature has the same effect as if every freeholder within the corporation or district had signed it. In so arguing, however, the appellants misconstrue the effect of the petition. The petition does not create the district; it merely secures consideration on the question of formation. In the process by which the decision whether to create the district is actually made, the hearing on the petition held by the conservancy court, all persons may raise their objections to the district's formation, regardless of whether the public corporation or water district in which they own property signed the petition. This is specifically guaranteed by statute.

> "Any owner of real property in a proposed district who individually has not signed such a petition and who wishes to object to the organization and incorporation of said district shall, on or before the date set for the cause to be heard, file his objections to the organization and incorporation of such district." Ohio Revised Code §6101.08 (Appellants' Appendix, 20).

In view of this patently clear provision in §6101.08 of the Revised Code of Ohio, it is obvious that Ohio Revised Code §6101.05 does not operate to deprive any freeholders

in the proposed district from fully participating in the hearing at which the conservancy court determines whether or not the district shall be organized.

CONCLUSION

Appellants' challenges to the constitutionality of the Ohio Conservancy Act are wholly insubstantial. Plenary consideration to this appeal is not warranted. The motion to affirm should be granted.

Respectfully submitted,

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APPENDIX A

Excerpt from Constitution of the State of Ohio Page's Ohio Revised Code Annotated (Appendix, 1976 Supplement)

Article IV § 4 Common Pleas court.

(A) There shall be a court of common pleas and such divisions thereof as may be established by law serving each county of the state. Any judge of a court of common pleas or a division thereof may temporarily hold court in any county. In the interests of the fair, impartial, speedy, and sure administration of justice, each county shall have one or more resident judges, or two or more counties may be combined into districts having one or more judges resident in the district and serving the common pleas courts of all counties in the district, as may be provided by law. Judges serving a district shall sit in each county in the district as the business of the court requires. In counties or districts having more than one judge of the court of common pleas, the judges shall select one of their number to act as presiding judge, to serve at their pleasure. If the judges are unable because of equal division of the vote to make such selection, the judge having the longest total service on the court of common pleas shall serve as presiding judge until selection is made by vote. The presiding judge shall have such duties and exercise such powers as are prescribed by rule of the supreme court.

(B) The courts of common pleas and divisions thereof shall have such original jurisdiction over all justicable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

(C) Unless otherwise provided by law, there shall be a probate division and such other divisions of the courts of common pleas as may be provided by law. Judges shall be elected specifically to such probate division and to such other divisions. The judges of the probate division shall be empowered to employ and control the clerks, employees, deputies, and referees of such probate division of the common pleas courts. (Amended, effective Nov. 6, 1973; SJR No. 30. Adopted May 7, 1968. Former § 4 repealed.)

APPENDIX B

Excerpts from Chapter 163 Page's Ohio Revised Code Annotated (1978 Replacement Volume)

§ 163.01 Definitions.

As used in sections 163.01 to 163.22, inclusive, of the Revised Code:

(A) "Public agency" means any governmental corporation, unit, organization, or officer authorized by law to appropriate property in the courts of this state. "Private agency" means any other corporation authorized by law to appropriate property in the courts of this state. "Agency" includes any public agency or private agency.

(B) "Court" includes the court of common pleas and the probate court of any county in which the property sought to be appropriated is located in whole or in part.

(C) "Owner" includes any individual, partnership, association, or corporation having any estate, title, or interest in any real property sought to be appropriated.

(D) "Real property," "land," or "property" includes any estate, title, or interest in any real property which is authorized to be appropriated by the agency in question, unless the context otherwise requires.

§ 163.04 Appropriation.

Appropriations shall be made only after the agency is unable to agree, for any reason, with the owner, or if more than one, any owner, or his guardian or trustee, or when any owner is incapable of contracting in person or by agent and has no guardian or trustee, or is unknown, or is not a resident of this state, or his residence is un-

known to the agency and cannot with reasonable diligence be ascertained.

§ 163.05 Petition for appropriation.

An agency which has met the requirements of section 163.04 of the Revised Code, may commence proceedings in a proper court by filing a petition for appropriation of each parcel or contiguous parcels in a single common ownership, or interest or right therein. The petition of a private agency shall be verified as in a civil action and all petitions shall contain:

(A) A description of each parcel of land or interest or right therein sought to be appropriated, such as will permit ready identification of the land involved;

(B) In the case of a private agency, a statement that such appropriation is necessary, and, in the case of a public agency, a copy of the resolution of the public agency to appropriate;

(C) A statement of the purpose of the appropriation;

(D) A statement of the estate or interest sought to be appropriated;

(E) The names and addresses of the owners, so far as they can be ascertained;

(F) A statement showing requirements of section 163.04 of the Revised Code have been met;

(G) A prayer for the appropriation.

In the event of the appropriation of less than the fee of any parcel or of a fee in less than the whole of any parcel of property, the agency shall either make available to the owner or shall file in the office of the county engineer, a description of the nature of the improvement or

use which requires the appropriation, including any specifications, elevations, and grade changes already determined at the time of the filing of the petition, in sufficient detail to permit a determination of the nature, extent, and effect of the taking and improvement. A set of highway construction plans shall be acceptable in providing such description for the purposes of the preceding sentence in the appropriation of land for highway purposes.

§ 163.06 Deposit with court; appraisal of structures.

(A) A public agency, other than an agency appropriating property for the purposes described in division (B) of this section, which qualifies pursuant to Section 19 of Article I, Ohio Constitution, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and thereupon take possession of and enter upon the property appropriated. The right of possession upon deposit as provided in this division shall not extend to structures.

(B) A public agency appropriating property for the purpose of making or repairing roads which shall be open to the public, without charge, may deposit with the court at the time of filing the petition the value of such property appropriated together with the damages, if any, to the residue, as determined by the public agency, and stated in an attached declaration of intention to obtain possession and thereupon take possession of and enter upon the property appropriated, including structures situated upon the land appropriated for such purpose or situated partly upon the land appropriated therefor and partly upon adjoining land, so that such structures cannot be divided upon the line between such lands without manifest injury thereto. The jury, in assessing compensation to any owner of land

appropriated under this division shall assess the value thereof in accordance with section 163.14 of the Revised Code. The owner or occupant of such structures shall vacate the same within sixty days after service of summons as required under section 163.07 of the Revised Code, at no cost to the appropriating agency, after which time the agency may remove said structures. In the event such structures are to be removed before the jury has fixed the value of the same, the court, upon motion of the agency, shall:

(1) Order appraisals to be made by three persons, one to be named by the owner, one by the county auditor, and one by the agency. Such appraisals may be used as evidence by the owner or the agency in the trial of said case but shall not be binding on said owner, agency, or the jury, and the expense of said appraisals shall be approved by the court and charged as costs in said case.

(2) Cause pictures to be taken of all sides of said structures;

(3) Compile a complete description of said structures, which shall be preserved as evidence in said case to which the owner or occupants shall have access.

(C) Any time after the deposit is made by the public agency under division (A) or (B) of this section, the owner may apply to the court to withdraw the deposit, and such withdrawal shall in no way interfere with the action except that the sum so withdrawn shall be deducted from the sum of the final verdict or award. Upon such application being made the court shall direct that the sum be paid to such owner subject to the rights of other parties in interest provided such parties make timely application as provided in section 163.18 of the Revised Code. Interest shall not accrue on any sums withdrawable as provided in this division.

§.163.07 Notice to owners of property.

When the residence of the owners is known and is within this state, notice of the filing of a petition as provided in section 163.05 of the Revised Code shall be given to all such owners by serving a summons and a copy of such petition in the manner of service of summons in civil actions. When the residence of the owners is unknown, and as to all who cannot be served within the state, notice shall be given by publishing the substance of the petition, and a statement of the date of the filing thereof and of the date on and after which the matter may be heard, once a week for two consecutive weeks, in a newspaper of general circulation in the county, or shall be given by registered mail. When service is made by publication, section 2703.16 of the Revised Code shall be complied with.

Unless a person acquiring any interest in any property described in an appropriation petition after the filing thereof moves to be made an additional party defendant prior to the date that the case is set for the jury trial on compensation or to any journalization of a settlement entry, he shall be bound by the final judgment, without right of appeal except as to distribution, and shall receive such compensation as was awarded to his predecessor in interest to the extent that he has succeeded thereto.

§ 163.08 Answer by property owner to petition.

Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon

in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 Valuation of property taken; how determined.

(A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties, the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of

the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty

days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

§ 163.10 Jury selection; qualifications.

The assessment of compensation may be made at a regular or special term of court. The jury shall be selected from the jurors drawn as prescribed in sections 2313.19 to 2313.26 of the Revised Code, and qualified as in civil actions. However, it shall be grounds for challenge for cause if a juror has served in two appropriation trials in the current term of court. Depositions may be taken as in other civil cases, subject to the requirements of section 5501.21 of the Revised Code. Depositions of the officers, agents, or employees of the agency or owner shall be taken as on cross-examination. No evidence may be adduced or elicited in depositions as to value or appraisals on cross-examination, unless raised by direct examination.

§ 163.14 Jury verdict; how determined.

In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that

the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

§ 163.15 When agency entitled to possession; transmission of final journal entry.

As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said final

journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code.

§ 163.16 Payment of costs.

The court costs, including jury fees, of any proceeding shall be paid as the court directs, except as may be provided for in cases of abandonment pursuant to section 163.21 of the Revised Code. The agency may offer to confess judgment in accordance with sections 2311.14 to 2311.20, inclusive, of the Revised Code, for the amount to be stated and the court costs then made in favor of any owner who in any manner enters an appearance or upon whom service has been made. If such owner refuses to accept such offer and as a result of the trial does not receive more, he shall pay all court costs accruing after the offer.

§ 163.19 Appeal; right to use property not affected.

Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts.

APPENDIX C

Excerpt from Chapter 2101 Page's Ohio Revised Code Annotated (1976 Replacement Volume)

§ 2101.01 Probate division; location; equipment; employees.

A probate division of the court of common pleas shall be held at the county seat in each county in an office furnished by the board of county commissioners, in which the books, records, and papers pertaining to the probate division shall be deposited and safely kept by the probate judge. The board shall provide suitable cases for the safekeeping and preservation of the books and papers of the court and furnish such blankbooks, blanks, and stationery as the probate judge requires in the discharge of official duties. The board shall also authorize expenditures for accountants, financial consultants, and other agents required for auditing or financial consulting by the probate division whenever the probate judge considers these services and expenditures necessary for the efficient performance of the division's duties. The probate judge shall employ and supervise all clerks, deputies, referees, and employees of the probate division.

As used in the Revised Code, "probate court" means the probate division of the court of common pleas, and "probate judge" means the judge of the court of common pleas who is judge of the probate division. All pleadings, forms, journals, and other records filed or used in the probate division shall be entitled "In the Court of Common Pleas, Probate Division," but are not defective if entitled "In the Probate Court."

APPENDIX D

Excerpt from Chapter 2723
Page's Ohio Revised Code Annotated
(1954)

§ 2723.01 Jurisdiction of courts of common pleas. (GC § 12075)

Courts of common pleas may enjoin the illegal levy or collection of taxes and assessments and entertain actions to recover them when collected, without regard to the amount thereof, but no recovery shall be had unless the action is brought within one year after the taxes or assessments are collected.

APPENDIX E

Excerpts from Chapter 6101
Page's Ohio Revised Code Annotated
(1977 Replacement Volume)

§ 6101.04 Organization and purposes of conservancy districts. (GC § 6828-2)

Any area or areas situated in one or more counties may be organized as a conservancy district, in the manner and subject to the conditions provided by sections 6101.01 to 6101.84, inclusive, of the Revised Code, for any of the following purposes:

(A) Preventing floods;

(B) Regulating stream channels by changing, widening, and deepening the same;

(C) Reclaiming or filling wet and overflowed lands;

(D) Providing for irrigation where it may be needed;

(E) Regulating the flow of streams and conserving the waters thereof;

(F) Diverting or in whole or in part eliminating water-courses;

(G) Providing a water supply for domestic, industrial, and public use;

(H) Providing for the collection and disposal of sewage and other liquid wastes produced within the district;

(I) Arresting erosion along the Ohio shore line of Lake Erie.

This section does not terminate the existence of any district organized prior to July 19, 1937, entirely within a single county.

The purposes of a district may be altered by the same procedure as provided for the establishment of such a district.

§ 6101.06 Bond of petitioners. (GC § 6828-4)

At the time of filing the petition provided for in section 6101.05 of the Revised Code, or at any time subsequent thereto and prior to the time of the hearing on said petition, a bond shall be filed, with security approved by the judge of the court of common pleas determining the sufficiency of the petition, sufficient to pay all the expenses connected with the proceeding in case the court refuses to organize the conservancy district. If at any time during the proceeding the court is satisfied that the bond first executed is insufficient in amount, it may require the execution of an additional bond within a time to be fixed, which shall be not less than ten days distant, and upon failure of the petitioners to execute such additional bond the petition shall be dismissed.

§ 6101.061 Notice to board, director of natural resources, and director of environmental protection; hearings.

Upon determining that a sufficient petition has been filed, the judge making such determination shall cause written notice thereof to be given to the director of the department of natural resources, the director of environmental protection, and to the board of directors of any conservancy district having jurisdiction over all or part of the territory affected by the proceeding or within the same major watershed area as defined by the department of natural resources and the director of environmental protection. The director of natural resources, the director of environmental protection, and the directors of such

conservancy districts may appear at any hearing considering the establishment, dissolution or merger of any conservancy district or subdistrict thereof, and be heard concerning the need for a conservancy district, the area that should be included, desirable improvements, and any other matters which in their opinion should be brought to the attention of the court.

§ 6101.18 Board may condemn property.

The board of directors of a conservancy district may condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the board of appraisers of the conservancy district, in the manner provided for in sections 163.01 to 163.22, inclusive, of the Revised Code, instead of having appraisals and assessments made by the board of appraisers.

§ 6101.27 Appointment of board of appraisers. (GC § 6828-26)

At the time of making its order organizing a conservancy district or at any suitable time thereafter, the court shall appoint three appraisers to constitute the board of appraisers of the conservancy district, who shall in every case where appraisers are appointed under sections 6101.01 to 6101.84, inclusive, of the Revised Code, be recommended by the board of directors of the conservancy district. Such board shall appraise the lands or other property within and without the district to be acquired for rights of way, reservoirs, and other works of the district, and shall appraise all benefits and damages accruing to all lands within or without the district and all benefits accruing to public corporations as entities by reason of the execution of the official plan. Said appraisers shall

be freeholders residing within the state, who may or may not own lands within said district. Each of the appraisers shall, before taking up his duties, take and subscribe to an oath that he will faithfully and impartially discharge his duties as an appraiser, and that he will make a true report of the work done by him. Such appraisers shall at their first meeting elect one of their own number chairman, and the secretary of the board of directors or his deputy shall be ex officio secretary of the board of appraisers during its continuance in office. A majority of the board of appraisers constitutes a quorum, and a concurrence of the majority in any matter within the board's duties shall be sufficient for its determination. Said appraisers shall continue to hold their offices until excused by the court, and the court shall fill all vacancies in the board of appraisers, or may appoint a new board of appraisers for subsequent appraisals, as occasion requires. A new board of appraisers, if appointed, shall fill all the requirements of the board of appraisers and perform its duties.

§ 6101.28 Appraisal of benefits and damages.

During the preparation of the official plan, the board of appraisers of a conservancy district shall examine and become acquainted with the nature of plans for the improvement and of the lands and other property affected thereby, in order that it may be better prepared to make appraisals.

When the certified copy of the entry of the court approving the official plan is filed with the secretary of the conservancy district, he shall at once notify the board of appraisers, and it shall thereupon appraise the benefits of every kind to all real property within or without the district, which will result from the organization of said district and the execution of the official plan. The board of appraisers shall appraise the damages sustained and the value of the land and other property necessary to be taken by the district for which settlement has not been made by the board of directors of the conservancy district. In the progress of its work, the board of appraisers shall have the assistance of the attorney, engineers, secretary, and other agents and employees of the board of directors.

The board of appraisers shall also appraise the benefits and damages accruing to municipal corporations, counties, townships, and other public corporations, as political entities, and to this state.

Before appraisals of compensation and damages are made, the board of directors may report to the board of appraisers the parcels of land or other property it wishes to purchase, and for which it wishes appraisals to be made, both for easement and for purchase in fee simple. The board of directors may, if it deems best, specify in case of any property the particular purpose for which and the extent to which an easement in the same is desired, describing definitely such purpose and extent. The board of appraisers shall appraise all damages which may, because of the execution of the official plan, accrue to real or other property either within or without the district, which damages shall also represent easements acquired by the district for all of the purposes of the district, unless otherwise specifically stated. Wherever instructed to do so by the board of directors, the board of appraisers shall appraise lands or other property which it is necessary or desirable for the district to own, and when instructed by the board of directors to do so, the board of appraisers shall appraise both the total value of the land, and also the damages due to an easement for the purposes of the district. When such appraisals are confirmed by the court,

the board of directors has the option of paying the entire appraised value of the property and acquiring full title to it in fee simple, or of paying only the cost of such easement for the purposes of the district. The board of appraisers in appraising benefits and damages shall consider only the effect of the execution of the official plan. In making appraisals, the board of appraisers shall give due consideration and credit to any other works or improvements already constructed, or under construction, which form a useful part of the work of the district according to the official plan. Where the board of appraisers returns no appraisal of damages to any property, it shall be deemed a finding by such board of appraisers that no damages will be sustained.

§ 6101.31 Board of appraisers shall make report of findings.

The board of appraisers of a conservancy district shall prepare a report of its findings which shall be arranged in tabular form and bound in loose-leaf book form, and which shall be known as the "conservancy appraisal record." Such record shall contain the name of the owner of property appraised as it appears on the tax duplicate or the deed records if ascertainable therefrom, the tax mailing address or other known address of such owner if ascertainable, a description of the property appraised, the amount of benefits appraised, the amount of damages appraised, and the appraised value of land or other property which may be taken for the purposes of the district. In case benefits are appraised accruing to a public corporation as an entity, the name and, if ascertainable, address of such public corporation and the amount of the benefit appraised shall be entered in such record. The board shall also report any other benefits or damages or any other

matter which in its opinion should be brought to the attention of the court. No error in the names or addresses of the owners of real property or in the descriptions thereof shall invalidate said appraisal or the levy of assessments or taxes based thereon, if sufficient description is given to identify such real property.

When such report is completed, it shall be signed by at least a majority of the board and deposited with the clerk of the court who shall file it in the original case. At the same time copies of that part of the report giving the appraisal of benefits and appraisals of land to be taken and of damages in any county shall be made, certified to, and filed with the clerk of the court of common pleas of such county.

§ 6101.32. Notice of hearing on appraisals.

Upon the filing of the report of the board of appraisers of a conservancy district under section 6101.31 of the Revised Code, the clerk of the court shall give notice thereof by publication, as provided in sections 6101.01 to 6101.84, inclusive, of the Revised Code, in each county in the district in which property included in the appraisal record is located. Said notice shall be substantially as set forth in division (F) of section 6101.84 of the Revised Code. It is not necessary for said clerk to name the parties interested, except that such notice shall be addressed "To All Known and Unknown Persons or Public Corporations Interested" and in addition shall specifically designate the name of each known party whose tax mailing or other address cannot be ascertained as disclosed by the affidavit referred to in this section, but the name of any such party need be designated only in the publication made in the county or counties wherein lands, or interests in lands, owned by the party and affected by the report are located.

It is not necessary to describe separate lots or tracts of land in giving said notice, but the heading of such notice and the text thereof shall give, and it is sufficient if each gives, such descriptions as will enable the owner of land or the owner of an interest of record therein to determine whether or not his land is covered by such descriptions. For instance, it is sufficient to state in the heading "NOTICE OF HEARING ON APPRAISALS ON LANDS LYING IN _____, _____, and _____ _____ TOWNSHIPS AND IN THE CITIES OR VILLAGES OF _____, and _____ in _____ COUNTY" and it is sufficient to state in the text "All land lying in the _____ ward of the city of _____," or "All land abutting on _____ street in the city of _____ _____," or "All land lying west of _____ river and east of _____ railroad in _____ _____ township," or any other general description pointing out the lands involved.

Where lands in different counties are mentioned in said report, it is not necessary to publish a description of all the lands in the district in each county, but only of that part of said lands located in the county in which publication is made.

The board of directors of such conservancy district shall, on or before the date of first publication of the notice provided for in this section, cause to be mailed by first class mail to the public corporations and to the owners of property whose names and respective tax mailing or other known addresses are disclosed by the affidavit referred to in this section a notice which in each case shall be directed to such respective address and which shall advise the addressee thereof of the date of the filing, and place of filing, of the report of the board of appraisers, and that the addressee has the right to file exceptions to the

report on or before a specified date and to be heard thereon in the county where his property is located at the time and place fixed by the court as provided by section 6101.33 of the Revised Code. In addition the notice shall contain, if the report includes an appraisal of benefits affecting the addressee, a statement that such benefits have been appraised and that assessments may be levied based upon, and not in excess of, such appraisal, and the dollar amount of the appraisal, shall contain, if the report includes an appraisal of property of the addressee to be taken or damaged, a statement that such property or the damage thereto has been appraised and the dollar amount of such appraisal, and shall contain any volume designation and page number of the report at which any appraisal affecting the addressee appears and a brief description of the property appraised as referred to in section 6101.31 of the Revised Code. In the case of property to be taken or damaged the board of directors shall cause like notice to be mailed on the same date to all other known persons having an interest of record in such property whose tax mailing or other known address is disclosed by the affidavit referred to in this section. The secretary of the conservancy district, or his deputy, as ex officio secretary of the board of appraisers, shall prepare and file with the clerk of the court on the date of the mailing of the notices provided for in this section an affidavit attesting in substance that as of the date of the mailing of the notices, the affiant has determined that the names of all public corporations and the names of the owners of all the property affected by the report of the board of appraisers, where such names are ascertainable, together with their respective tax mailing or other known addresses where ascertainable, are listed in the report of the board of appraisers with the exception of such differing names or addresses as may be specifically set forth in the affidavit,

that no names and no tax mailing or other known addresses are ascertainable except as may be disclosed by such report as supplemented by the affidavit, and that notices have been mailed as provided for in this section to each public corporation and to each owner of property having a tax mailing or other known address as shown by such report or affidavit and to all other persons having an interest of record in property to be taken or damaged whose interest is known or can be ascertained from such record. Such affidavit shall be given on the basis of available information and after the exercise of reasonable diligence, and the affidavit shall so state. Such affidavit shall be prima-facie evidence of the matters attested to therein.

§ 6101.35 Appeal from award; bond; requirements.

Any person or public or private corporation desiring to appeal from an award as to compensation or damages shall, within twenty days from the judgment of the court confirming the report of the board of appraisers of a conservancy district, file with the clerk of such court a written notice making demand for a jury trial, specifying the award or awards from which the appeal is taken. He shall at the same time file a bond with good and sufficient security to be approved by the clerk in the sum of not more than two hundred dollars to the effect that if the appellant does not recover more by the verdict of the jury than the sum awarded him by the board, or if the verdict is not more favorable to him, he will pay the costs of the appeal.

The appeal shall be from the award of compensation or damages, or both, shall require the conservancy district to commence proceedings pursuant to sections 163.01 to 163.22, inclusive, of the Revised Code, but shall not include the questions of necessity for the appropriation, inability of the parties to agree, or any other part of the decree of the court.

Upon filing a petition as provided for in section 163.05 of the Revised Code, a copy thereof shall be served upon each appellant or his attorney, and no other service of summons is necessary.

§ 6101.43 Proceedings not invalid except when defects result in denial of justice.

No fault in any notice or other proceedings, whether by reason of noncompliance with the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or with any applicable constitutional requirements, or otherwise, shall affect the validity of any proceeding under sections 6101.01 to 6101.84, inclusive, of the Revised Code, except to the extent to which it can be shown that such fault resulted in a material denial of justice to the property owner of public corporation complaining of such fault.

If it is found upon a hearing that by reason of some irregularity or defect in the proceedings the appraisal has not been properly made, the court may nevertheless, on having proof that expense has been incurred which is a proper charge against the property of the person, or against the public corporation, complaining of such irregularity or defect, render a finding as to the amount of benefits to said property or public corporation, and appraise the proper benefits accordingly, subject to a claim for a jury as provided in section 6101.35 of the Revised Code, where the party is entitled thereto. Thereupon said land or public corporation shall be assessed as other land or public corporations equally benefited. If at any time either before or after the issuance of bonds or notes pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised

Code, the appraisal of benefits, either as a whole or in part, is declared by any court of competent jurisdiction to be invalid by reason of any defect or irregularity in the proceedings therefor, whether jurisdictional or by reason of noncompliance with any of the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or with any applicable constitutional requirements, or otherwise, the court of common pleas, on the application of the board of directors of the conservancy district or on the application of any holder of any bonds or notes which have been issued pursuant to such sections, shall promptly and without delay remedy, or cause to be remedied, all defects or irregularities as the case requires and for such purpose may direct the board of appraisers of the conservancy district to make, in the manner provided in section 6101.28 of the Revised Code, a new appraisal of the amount of benefits against the whole or any part of the lands or any public corporation in said district as the case requires and may order a new hearing to be held after giving of notice thereof in compliance with the requirements of sections 6101.01 to 6101.84, inclusive, of the Revised Code, or such other and further notice as the court shall prescribe to comply with any applicable constitutional requirements.

§ 6101.59 Conservancy assessment constitutes a lien.

All conservancy assessments and taxes provided for in sections 6101.01 to 6101.84, inclusive, of the Revised Code, together with all penalties for default in payment of the same, and all costs in collecting the same, including a reasonable attorney's fee to be fixed by the court and taxed as costs in the action brought to enforce payment, from the date of filing the certificate described in this section in the office of the county auditor for the county wherein the lands and properties or public corporations

are located, until paid, shall constitute a lien, to which only the lien of the state for general state, county, municipal corporation, school, and road taxes shall be paramount, upon all the lands and other property or public corporation against which such taxes are levied as is provided in sections 6101.01 to 6101.84, inclusive, of the Revised Code. No lands or properties to which the lien of the conservancy assessments or taxes has attached shall be forfeited to the state pursuant to its lien for taxes except pursuant to section 5723.01 of the Revised Code. Such lien of the conservancy assessments and taxes may be evidenced by a certificate substantially in the form in the schedule provided in section 6101.84 of the Revised Code. The certificate and tables shall be prepared in a well-bound book by the secretary of the conservancy district at the expense of the district.

Unless expressly declared to the contrary, no warranty in any warranty deed or in any deed made pursuant to a judicial sale shall warrant against any portion of any assessment levied under sections 6101.01 to 6101.84, inclusive, of the Revised Code, except past and current installments payable in the year which such deed bears date.

§ 6101.60 Suits for delinquent taxes and assessments; procedure. (GC § 6828-54)

The "Delinquent Assessment Book" of a conservancy district is prima-facie evidence in all courts of all matters therein contained. The liens established and declared in section 6101.59 of the Revised Code may be enforced at the option of the board of directors of the conservancy district by an action on delinquent tax bills or assessment bills, made and certified by the county auditor, which action shall be instituted in the court of common pleas, without regard to the amount of the claim, within

six months after the thirty-first day of December of the year for which said assessments were levied. The suit shall be brought in the corporate name of the district by its attorney against the land, property, or public corporation on which such tax or assessment has not been paid.

In the event of any default in the payment of the interest or principal of any bonds or notes issued pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised Code, and if the district or its proper officers fail to enforce the payment of any unpaid tax or assessment, the holder of such bonds or notes may, for himself and for the benefit of all others similarly situated, enforce said liens by suit or action against the land, property, or public corporation on which such tax or assessment has not been paid, and against the district. The court shall have full power, jurisdiction, and authority to apply such tax or assessment when collected in the payment of the interest or principal upon said bonds or notes as justice and equity require. The suit shall be brought in the county in which the property or public corporation is located, except when the tract or property sued upon is in more than one county, in which event the suit may be brought on the whole tract, parcel, or property, in any county in which any portion thereof is located. The pleadings, process, proceedings, practice, and sales, in cases arising under such sections, except as provided in such sections, shall be the same as in an action for the enforcement of the state's lien for delinquent general taxes upon real estate.

All sales of lands made under this section shall be by the sheriff as provided by law. All sheriff's deeds executed and delivered pursuant to sections 6101.01 to 6101.84, inclusive, of the Revised Code, shall have the same probative force as other deeds executed by a sheriff. Abbreviations shall not defeat the action. The title acquired through any

sale of lands or other property under such proceedings shall be subject to the lien of all subsequent annual installments of conservation or drainage tax or assessment.

In all suits for the collection of delinquent taxes or assessments, the judgment for said delinquent taxes or assessments and penalty shall also include all costs of suit and a reasonable attorney's fee to be fixed by the court, recoverable the same as the delinquent tax and in the same suit.

The proceeds of sales made under and by virtue of such sections shall be paid at once to the county treasurer and shall be properly credited and accounted for by him the same as other conservation taxes and assessments.

If any assessment made pursuant to such sections is invalid, the board shall by subsequent or amended acts or proceedings promptly remedy all defects or irregularities as the case requires by making and providing for the collection of new assessments or otherwise.

APPENDIX F

Excerpts from
The Ohio Legal Directory 1976-1977
(Legal Directories Publishing Company, Inc., 1976)

LAWRENCE COUNTY — Population 55,351
COUNTY SEAT — IRONTON (Area Code 614 - Zip 45638
4th Judicial District

Judges Court of Appeals
- Homer E. Abele ..... (McArthur) 596-4305
- Earl E. Stephenson ..... (Portsmouth) 354-4300
- Lawrence Grey ..... (Athens) 593-5093

Judges Common Pleas
- Kenneth B. Ater ..... (Ironton) 532-4466
- Roy L. Henry ..... (Ironton) 532-4466

Probate Judge
- Lloyd Burwell ..... (Ironton) 532-7982

Judge County Court
- J. Stewart Kaiser ..... (Chesapeake) 867-3254

Clerk Common Pleas
- Dale Burcham ..... (Ironton) 532-7982

Prosecuting Attorney
- Richard Meyers ..... (Ironton) 532-7982

Court Reporter
- Edna Chapman ..... (Ironton) 532-4466

County Auditor
- Ray G. Waller ..... (Ironton) 532-7982

County Treasurer
- Bernard McKnight ..... (Ironton) 532-7982

County Recorder
- Ray T. Dutey ..... (Ironton) 532-7982

Assignment Commissioner
- Jo Gallion ..... (Ironton) 532-4466

County Coroner
- H. H. Nenni, M.D. ..... (Ironton) 532-5353

Sheriff
- James Howell ..... (Ironton) 532-3525

County Engineer
- Ralph Hill ..... (Ironton) 532-7982

County Commissioners
- W. H. Kaiser ..... (Ironton) 532-7982
- Louis Bryant ..... (Ironton) 532-7982
- Mark Malone ..... (Ironton) 532-7982

Ibid. at 431.

SCIOTO COUNTY — Population 77,082
COUNTY SEAT — PORTSMOUTH (Area Code 614 - Zip 45662
4th Judicial District

Judges Court of Appeals
- Homer E. Abele ..... (McArthur) 596-4305
- Lawrence Grey ..... (Athens) 593-5093
- Earl E. Stephenson ..... (Portsmouth) 534-4300

Probate Judge
- William T. Miller ..... (Portsmouth) 353-1189

Clerk of Courts
- Mildred E. Thompson ..... (Portsmouth) 353-4829

Probate Clerk
- Eva Rhoden ..... (Portsmouth) 353-1189

Prosecuting Attorney
- Lynn A. Grimshaw ..... (Portsmouth) 354-3226

Court Reporter
- Jeanne Tyler ..... (Portsmouth) 353-6068

County Auditor
- Roy E. Vastine ..... (Portsmouth) 354-3219

County Treasurer
- Ronald Greene ..... (Portsmouth) 353-3859

Judges Common Pleas
- Ralph W. Mullins ..... (Portsmouth) 353-6068
- John B. Marshall ..... (Portsmouth) 353-6068

County Recorder
- Harold Hanes ..... (Portsmouth) 353-6519

Assignment Commissioner
- Catherine Smith ..... (Portsmouth) 353-6246

County Coroner
- Dr. John Cunningham ..... (Portsmouth) 353-4219

Sheriff
- John P. Knauff ..... (Portsmouth) 354-7566

County Engineer
- Timothy Thoroughman ..... (Portsmouth) 354-4898

County Commissioners
- Wilbur Rase ..... (Portsmouth) 354-5664
- Howard Griffin ..... (Portsmouth) 354-5664
- Paul Griffith ..... (Portsmouth) 354-5664

Ibid. at 500-501.